COMPANY LAW OF CANADA

BY

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PREFACE

It is now nearly twenty years since the first edition of Masten on Company Law was published. During that period decisions on company law, both in our own courts and in England, have been very numerous, and extensive changes in the statute law have been enacted. The result is that, while founded to some extent on the first edition, this is practically a new book, rather than a second edition.

The large number of statutes, Dominion and Provincial, relating to companies present a considerable obstacle to the satisfactory treatment of company law in Canada. Varying legislation has been enacted by each of the Provinces and by the Dominion. The many points of difference between these acts, often merely verbal and requiring no comment or discussion, render it inconvenient and unsatisfactory, in the opinion of the authors, to adopt the plan of a general treatise on Canadian company law drawing attention in detail to all the variations among the acts of the Dominion and the Provinces.

Consequently the same plan has been adopted as in the former edition, viz., to prepare a practical handbook noting the cases under the appropriate sections of the Companies Act, but in the present edition the Dominion Act instead of the Ontario Act has been made the basis for the notes. The Dominion Act has been selected, not only because of its intrinsic importance, but also because a very large proportion of the commercial corporations in Canada are organized under that act, or under acts of a similar character such as the Ontario

or other letters patent acts. For the convenience of Ontario practitioners, the Ontario Act has also been annotated with cross references to the corresponding sections of the Dominion Act, and with special notes where these have been thought necessary.

The Authors have endeavored to refer to all Canadian cases which may still be law, and, also where the importance of the topic justified it, to amplify their notes into a general discussion of the subject so as to present a working basis for the consideration of the practitioner, no matter what act he is working under. At the same time, it has been sought to make the treatment practical and to avoid discussions of a merely theoretical character.

The book is largely the work of Mr. Fraser, though some of the notes have been written, and all have been perused and revised, by Mr. Justice Masten. The Authors hope that the edition may prove a real assistance to the profession.

June 2, 1920.

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Young v. David Payne & Co. (1904) 2 Ch. 608 .....361, 364, 368
Young v. McNider (1895) 25 S. C. R. 272 382
Young v. Naval, etc., Society (1905) 1 K. B. 687 .....462, 869
Young v. Smith (1915) 21 D. L. R. 97; 8 A. L. R. 256 192
Yuill v. Greymouth & Point Elizabeth Ry. and Coal Co. (1904) 1 Ch. 32 .....478, 490

Z.

Zoological Society of Ontario, Re, Cox's Case (1889) 10 P. R. 434. 230
Zoological Acclimatization Society, Re, 17 O. R. 331 10
Zoological, etc., Society of Ontario, Re (1889) 16 A. R. 543 ..785, 786
Zoological, etc., Society, Re; Re Piper, Ex p. Boswell & Galt (unreported) 831

CORRIGENDA.

P. lxviii., l. 28. Read "*Shaw* v. *Tati Concessions*."
P. 2, l. 30. For "1920" read "1902."
P. 45, l. 28. For "registrar" read "register."
P. 93, l. 5. For "44 O. L. R.," read "43 O. L. R."
P. 257, l. 4. After "unless" insert "the dividends on."
P. 294, l. 31. For "86" read "186."
P. 528, l. 30. Omit "such."
P. 634, l. 29—delete line and read:
Where a company or any of its officers, agents or brokers.

THE DOMINION COMPANIES ACT

R. S. C. (1906), Chapter 79 and Amending Acts.

An Act Respecting Companies.

SHORT TITLE.

1. This Act may be cited as the Companies Act. Short title.

The principal Acts of the Dominion of Canada relating generally to companies and company law are,—

1. The Companies Act, R. S. C. (1906), c. 79, as amended by 7-8 Ed. VII. c. 16; 4-5 Geo. V. c. 23 (The Companies Act Amendment Act, 1914); 7-8 Geo. V. c. 25 (The Companies Act Amendment Act, 1917); and 8-9 Geo. V. cc. 13 and 14.

2. The Winding-up Act, R. S. C. (1906) c. 144.

Amended 6-7 Ed. VII. (1907) c. 51; 7-8 Ed. VII. cc. 10, 74, 75; 9-10 Ed. VII. c. 62; (1912) c. 24; (1915) c. 21; (1916) c. 5.

Separate legislation has been enacted by the Parliament of Canada in regard to railways, banks, insurance, loan and trust companies, as follows:—

Banks.—R. S. C. (1906) c. 29. Amended (1908) c. 7; (1911) c. 4; (1912) c. 5; (1913) c. 9 c.; (1914) 2nd sess. c. 3; (1915) c. 1; (1916) c. 10.

Railways.—(1919) c. 68.

Insurance companies.—R. S. C. (1906) c. 34; (1908) c. 69; (1910) c. 32 c; (1915) c. 5; (1916) c. 8; (1917) c. 29 c; (1919) c. 57.

Loan companies.—(1914) c. 40.

Trust companies.—(1914) c. 55.

These and other companies respecting which special legislation has been passed, are governed primarily by their special Act of Incorporation, and, secondly, by the general statutes above mentioned when not inconsistent with the terms of the special Act.

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Dominion companies may be incorporated in two ways,—

1. By Letters Patent, in which case they are governed by Part I. of this Act.

2. By special Act of Incorporation, in which case they are governed by such special Act supplemented (where not inconsistent) by Part II. of this Act.

Since June 12th, 1914, loan companies can not be incorporated by letters patent under Part III. of the Companies Act: Loan Companies Act, 1914, 4-5 Geo. V. c. 40, s. 4; and from the same date the incorporation of a trust company by letters patent under Part I. of the Companies Act is forbidden: Trust Companies Act, 1914, 4-5 Geo. V. c. 55, s. 4. The last mentioned Act further provides (s. 3, s.-s. 2) that the provisions of Part II. of the Companies Act shall not apply to any trust company which may be thereafter incorporated by Act of the Parliament of Canada.

PART I.

JOINT STOCK COMPANIES.

Application of Part.

New companies. Old companies.

2. This Part applies to,—

(*a*) all companies incorporated under it;

(*b*) all companies incorporated under the Companies Act, chapter one hundred and nineteen of *The Revised Statutes of Canada,* or to which that Act applied before the fifteenth day of May, one thousand nine hundred and two, excepting loan companies. 2 E. VII., c. 15, s. 2.

(*c*) all companies incorporated under *The Companies Act, 1920.* (7-8 Ed. VII., 1908, c. 16, s. 1).

Except as provided in Parts IV. and V., this Act does not relate to Foreign Corporations, Provincial Companies, Banks, Railway or Insurance Companies.

Part II. applies to companies incorporated by special Act, except trust companies incorporated after June 12th, 1914.

Part III. applies to loan companies. By 4-5 Geo. V. c. 40, s. 4, it is enacted that 'No letters patent incor-

porating a loan company shall after the passing of this Act be issued under the provisions of Part III. of the Companies Act, chapter 79, the Revised Statutes of Canada, 1906.' Sect. 2.

Interpretation.

3. In this Part, and in all letters patent and supplementary letters patent issued under it, unless the context otherwise requires,— Definitions.

(a) 'the company' or 'a company' means any company to which this Part applies; 'Company.'

(b) 'the undertaking' means the business of every kind which the company is authorized to carry on; 'Undertaking.'

(c) 'real estate' or 'land' includes messuages, lands, tenements, and hereditaments of any tenure, and all immovable property of any kind; 'Real estate.'

(d) 'shareholder' means every subscriber to or holder of stock in the company, and includes the personal representatives of the shareholder; 'Shareholder.'

(e) 'manager' includes the cashier and his secretary; 'Manager.'

(f) 'court' means in Ontario, the Supreme Court of Ontario; in Quebec, the Superior Court in and for that province; in Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, the Supreme Court in and for each of those provinces, respectively; in Manitoba, the Court of King's Bench for Manitoba; in the provinces of Saskatchewan and Alberta, a superior court; and in the Yukon Territory, the Territorial Court (7-8 Geo. v. c. 25, s. 2.) 'Court.'

(g) 'judge' means in the said respective provinces and Territory a judge of the said courts respectively. 2 E. VII., c. 15, ss. 3, 53 and 79. 'Judge.'

(h) 'debenture' includes bonds and debenture stock. (7-8 Geo. V. c. 25, s. 2). "Debenture."

Supplementary to the above are to be read section 30 and sub-section (g) of section 31 of the Interpretation Act (Canada), R. S. C. (1906) c. 1, which are as follows:— Interpretation Act.

Section 30. In every Act, unless the contrary intention appears,—

Words making any association or number of persons a corporation or body politic and corporate shall (a) vest in such corporation power to sue and be sued, contract and be contracted with by their corporate name, to have a common seal, to alter or change the

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same at their pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and to alienate the same at pleasure; and, (b) vest in a majority of the members of the corporation the power to bind the others by their acts; and, (c) exempt individual members of the corporation from personal liability for its debts or obligations or acts if they do not violate the provisions of the Act incorporating them.

2. No corporation shall be deemed to be authorized to carry on the business of banking unless such power is expressly conferred upon it by the Act creating such corporation.

Section 31. In every Act, unless a contrary intention appears,—

(g) If a power is conferred to make any rules, regulations or by-laws, the power shall be construed as including a power, exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend or vary the rules, regulations or by-laws and make others.

In addition to the foregoing definitions set forth in the Act itself, the following definitions, explanations and interpretations of words and phrases may usefully be considered:

Articles of Association.

In England, Articles of Association are similar to by-laws under this Act, and are for the regulation and management of the corporation.

Allotment.

Interpretation of—necessity for. See *Nelson* v. *Pellatt* (1902), 4 O. L. R. 481.

After Four Days' Notice.

See *Re Arnold Chemical Co.*, 2 O. L. R. 671; *Re Farmers Bank* (1910-11) 2 O. W. N. 623; 22 O. L. R. 556.

Bond.

A bond of a corporation is an instrument executed under the seal of the corporation acknowledging a loan

and agreeing to pay the same upon terms set forth therein. A coupon bond is one that has coupons attached usually in the form of promissory notes to pay an amount of money equivalent to the annual or semi-annual interest on the bond. A registered bond is one whose negotiability is temporarily withdrawn by a writing on the bond that it belongs to a specific person and by a registration to that effect at an office specified by the company. Sect. 3.

Bond Mortgage.

A mortgage given by a corporation may be similar to the ordinary mortgage given by an individual. But usually a corporate mortgage is made in the form of a mortgage deed of trust. Such a deed of trust is a mortgage to a trustee for bondholders, the bonds being secured by the mortgage deed of trust. The trustee may be an individual, but generally is a trust company.

By-law.

A by-law is a permanent rule of action in accordance with which the corporate affairs are to be conducted. A by-law differs from a resolution in that a resolution applies to a single act of the corporation, while a by-law is a permanent and continuing rule which is to be applied on all future occasions.

Certificate of Stock.

A certificate of stock is from one point of view a mere muniment of title like a title deed. It is not the stock itself but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the stockholder; it operates to transfer nothing from the corporation to the stockholder, but merely affords to the latter evidence of his rights: *Higgins* v. *Lansingh*, 154 Ill. 301 (1895); *Hawley* v. *Brumagim*, 33 Cal. 394 (1867).

Contributory.

See *Re McDonald and The Noxon Bros. Mfg. Co.*, 16 O. R. 368; *Re Central Bank of Canada, Yorke's Case*, 15 O. R. 625; *Re Monarch Bank* (1914) 32 O. L. R. 207.

Sect. 3. **Capital Stock.**

Authorized capital stock or authorized share capital is the sum fixed by the corporate charter as the amount of share capital issuable by the corporation and paid in or to be paid in by the stockholders for the prosecution of the business of the corporation upon being subscribed for and called up: *Smith* v. *Goldsworthy,* 4 Q. B. 430; *Bourne* v. *Freeth,* 9 B. & C. 632; *Cooke* v. *Marshall,* 191 Pa. St. 315.

Subscribed capital stock or subscribed share capital is that portion of the authorized capital stock which has been subscribed.

Paid-up capital stock is that portion of the subscribed capital stock which has been paid in to the company by the holders of shares. It represents the money or money's worth which the company actually has or has had.

Corporator.

A corporator, sometimes called an incorporator, is one of those to whom a charter is granted, or one of those who file a petition for incorporation under a general incorporating statute: *Chase* v. *Lord,* 77 N. Y. 1, 11 (1879); *In re Lady Bryan Co.,* 1 Sawy. 349 (1870).

Corporation.

A Corporation is an artificial person, a mere abstraction of law. It is a distinct existence and entity—not a mere aggregate of the shareholders: *Re Sheffield, &c., Society,* 22 Q. B. D. 476; *Flitcroft's Case,* 21 C. D. 535; *Dartmouth College* v. *Woodward* (1819) 4 Wheat. 518 at 636.

A Corporation is an entity, an existence, irrespective of the persons who own all the stock. The fact that one person owns the stock does not make him and the corporation one and the same person: *Salomon* v. *Salomon* (1897) A. C. 22; *Rielle* v. *Reid* (1899) 26 A. R. 54; *Andrews Bros.* v. *Youngston,* 86 Fed. Rep. 585.

Lindley considers companies formed under the English Companies Acts as "Partnerships incorporated by registration:" Lindley, 6th Edition, page 8.

Having regard to the language of Section 5 of this Act, a company formed thereunder appears to be a corporation proper rather than an incorporated registered partnership. The recent decisions in England tend in the direction of making the Companies Acts a code by which the powers of the company, the rights of creditors against it, and the mutual rights and obligations of the shareholders among themselves are to be determined rather than by any analogy to the equitable principles relating to partnerships. Sect. 3.

Classes of Corporations.

When divided with respect to the members of corporations they are aggregate and sole. As regards their functions they are public such as cities and towns; *quasi-public* such as railway and steamship companies, telegraph and telephone companies, etc.; and again, private corporations are divided into ecclesiastical and lay; and still further, lay corporations are divided into eleemosynary or charitable and civil.

For the purposes of the Act companies are divided into companies with shares of a nominal or par value and those with shares of no nominal or par value (ss. 5 and 7B); corporations without share capital (s. 7A); and private companies whose letters patent restrict the transferability of their shares, limit the number of members to fifty and prohibit any offer to the public of their shares or debentures (s. 43C (3)).

A domestic corporation is one that has been organized under the laws of the State referred to. A foreign corporation is one that has been organized under the laws of another State or of a foreign government.

Charter.

A Charter is the instrument which creates the corporation.

A Charter is special where a special Act of the Legislature creates the corporation. A Charter is under the general Act when it consists of a certificate of incorporation issued in accordance with a general Act of Parliament allowing corporations to be formed in that manner. A company incorporated under the

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general law is governed not only by its Charter, but by its by-laws and by the general Statutes of the State by which the incorporation is granted: See *People* v. *Chicago Gas Co.,* 130 Ill. 268.

Divisible Profits.

Divisible Profits—Divisible Surplus: *Baur* v. *Aetna Life Ins. Co.,* 20 O. R. 6.

Debenture.

The word "Debenture" has no definite legal meaning except that it always means a debt. It may be applied to any promise or security of the company to pay money. It may be a mere promise to pay or a covenant under seal to pay or a mortgage or charge under the seal of the company. The term as used in the Act includes bonds and debenture stock (s. 3 (h)).

Fully Paid and Non-assessable.

See *Kettle River Mines* v. *Bleasdell,* 7 B. C. R. 507.

Flotation.

Flotation of a property means a sale thereof at a profit to a substantial company.

Founders' Shares.

Founders' Shares are shares which take the profits after certain dividends are paid on the other shares. They are issued to the founders or promoters of the enterprise. They are unknown in Canada.

Re New Transvaal Co. (1896) 2 Ch. 750.

Incorporators.

The State creates the corporation upon the application of individuals who are called incorporators. The incorporators then organize the corporation. After incorporation is completed and a permanent board of directors is elected the functions of the incorporators cease.

In Trust.

See *Duggan* v. *London and Canadian Loan and Agency Co.,* 19 O. R. 272; 18 A. R. 305; 20 S. C. R. 481; *Hart* v. *Ont. Express, Kirk & Marling's Case,* 24 O. R. 340; *Raphael* v. *McFarlane,* 18 S. C. R. 183.

Just and Equitable.

See *Re Florida*, 9 B. C. R. 108.

Labourers.

See *Welsh* v. *Ellis*, 22 A. R. 255.

Memorandum of Association.

The memorandum of association of a company incorporated with memorandum and articles of association is similar to the Canadian Letters Patent or Charter in that it defines the scope, objects and powers of the corporation.

Officers of the Corporation.

Canada Atlantic Railway Company v. *Moxley*, 15 S. C. R. 145. See also *Powell-Rees* v. *Anglo-Canadian* (1912) 26 O. L. R. 490; 5 D. L. R. 818.

Proposed to be Incorporated.

In re London Speaker Printing Co., Pearce's Case, 16 A. R. 508.

Powers Express and Implied.

Express powers are those which are expressly specified in the charter or the statute under which the corporation was incorporated.

Implied powers of a corporation are those which naturally arise from the nature of the business or which independently of express enactment are ascribed to it by law.

Property.

See *Re Kingston Arbitration* (1902) 3 O. L. R. 637.

Proxy.

Proxy means any person representing an absent shareholder and duly authorized in accordance with the by-laws to act for him at a meeting of shareholders. The term is also applied to the document authorizing the person representing an absent shareholder so to act.

Share.

"A share of stock may be defined as a right which its owner has in the management, profits and ultimate

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assets of the corporation. By the Court of Appeals in New York it is said that 'the right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after the payment of its debts' '': *Plimpton* v. *Bigelow,* 93 N.Y. 592, 599 (1883); Cook on Corporations, 7th ed., vol. 1, para. 12.

Scrip.

In England scrip is a written acknowledgment by a corporation that the holder will be entitled to certain shares of stock and a certificate therefor when the unpaid instalments on such shares are all paid in. It is a negotiable instrument: *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476.

Securities.

The word " securities " means bonds, certificates of stock and other evidences of debt or of property: *Thayer* v. *Nathan,* 17 Tex. Cir. App. 382 (1897).

Servants.

See *Welsh* v. *Ellis,* 22 A. R. 255.

Shareholder.

Re Zoological and Acclimatization Society of Ontario, 17 O. R. 331.

Hendrie v. *Grand Trunk Ry.* 2 O. R. 441.

Stock Ledger.

The stock ledger contains a statement of how much stock the past and present stockholders have owned or now own: *Craig* v. *Hesperia,* 113 Cal. 7 (1896).

Transfer Book.

The transfer book is for the purpose of keeping a record of transfers of stock. The entries in it correspond to the transfers on the back of the cancelled certificates of stock. The entries in the transfer book are generally made by a clerk as attorney in fact for the transferor. The form of transfer on the back of the certificate contains such a power of attorney.

Underwriting. Sect. 3.

Underwriting means an agreement before the shares are brought before the public that in the event of the public not taking all the shares or the number mentioned in the agreement, the underwriter will take the shares which the public do not take: *Re Licensed Victuallers' Assoc.* (1889), L. R. 42 Ch. D. 1.

Preliminaries.

4. The provisions of this Part relating to matters preliminary to the issue of the letters patent or supplementary letters patent shall be deemed directory only, and no letters patent or supplementary letters patent issued under this Part shall be held void or voidable on account of any irregularity in respect of any matter preliminary to the issue of the letters patent or supplementary letters patent. 2 E. VII., c. 15, s. 4. Are directory only.

Compare the Imperial Companies Act, 1908, s. 17. The Imperial Act is stronger in its terms than the Canadian Act so that the cases decided under the former are to be applied with caution in construing this section. Preliminaries.

In conjunction with this section there is to be read section 111 of this Act: "Except in any proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling letters patent or supplementary letters patent issued under this Part, such letters patent or supplementary letters patent or any exemplification or copy thereof, shall be conclusive proof of every matter and thing therein set forth."

Sections 4 and 111 establish two propositions:

First: The validity of the charter of a company incorporated under this Act cannot under any circumstances be collaterally attacked or questioned in any action brought by or against the company. The validity of the charter can be questioned only in an action directly and specially brought for that purpose.

Second: In consequence of the provisions of section 4 a charter granted under this Act cannot be questioned even in an action specially brought for that purpose for mere irregularity in any proceeding preliminary to the granting of the charter.

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Under the provisions of this Act it is submitted that no private person can institute a suit to declare a forfeiture of a charter but that any such action must be taken in the name of the Attorney-General or Minister of Justice upon leave obtained for that purpose.

Further, in consequence of the provisions of Section 111 above quoted, no one will be allowed to assert that the corporation is invalid or illegal until after such a result has been decreed by a Court in an appropriate proceeding for that purpose.

Apart from the provisions of this section and of section 111, there is apparently no general rule of law preventing any party from questioning the legal existence of a corporation by way of collateral attack.

See Grant on Corporations 39.

Where a company was incorporated under an Ontario Act *containing no provision similar to the above*, it was held to be open to the defendants to show that the corporate character had never been obtained in consequence of the non-performance of conditions plainly required as precedent to the right to acquire corporate status: *Hamilton and Flamborough Road Co.* v. *Townsend* (1887) 13 A. R. 534.

This holding was on the ground that certain of the petitioners for incorporation were infants; but under the Imperial Act containing provisions similar to those of this Act it has been held that the incorporation was not rendered invalid by the fact that one of the subscribers was an infant: *Nassau Phosphates Co.*, 2 Ch. D. 610; *Laxon & Co.* (1892), 3 Ch. 555.

Mere irregularities in matters of machinery are covered by this section and in regard to them the certificate is absolutely conclusive and cannot be attacked even by the Crown. As examples see *Peel's Case*, L. R. 2 Ch. 674; *Oakes* v. *Turquand*, 1867, L. R. 2 H. L. 325; *Glover* v. *Giles*, 18 Ch. D. 173, at 180.

But the public official, whether Registrar, Secretary of State or Provincial Secretary acting under the Companies Act, cannot by the granting of letters patent create a jurisdiction in himself so as to enable a company to which the Act has no application to be incor-

porated. As under this Act it is a condition precedent that the company shall consist of five members as incorporators, if it consists of only three or four the officers cannot by issuing the charter incorporate the company: *Re National Debenture and Assets Corporation* (1891), 2 Ch. 505; see also observations of Lord Davey in *Salomon* v. *Salomon* (1897) A. C., page 55. Sect. 4.

The American rule is similar and is stated in Cook on Corporations, 5th ed., section 637, as follows:—"If there is a law authorizing incorporation and a company has attempted to organize under it and has acted as a corporation it is a *de facto* corporation and its *de jure* existence can be questioned only by the State:" *Independent Order* v. *United Order,* 94 Wis. 234 (1896); *Toledo R. R.* v. *Connecticut Trust Co.*, 95 Fed. Rep. 497, 508 (1899). See also Machen, Sections 268-270.

The principal grounds upon which the validity of incorporation has been questioned are:—

(*a*) That the necessary number of incorporators having a proper status within the terms of the Act have not signed the petition for incorporation.

(*b*) That the purposes for which the corporation is organized are wholly outside the Act under which incorporation has been sought.

(*c*) Fraud or misrepresentation in the application for incorporation.

(*d*) Illegality in the purpose for which the corporation is organized.

(*e*) Irregularity in respect to some matter or matters preliminary to the issue of the letters patent, such as insufficiency or absence of a preliminary notice prescribed by the Act.

Note that ground (*e*) is eliminated by this section.

The following cases afford illustrations of the principles on which letters patent have been set aside: *La Banque d'Hochelaga* v. *Murray,* 15 A. C. 414; *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada,* 21 S. C. R. 72; *Hardy* v. *Pickerel River Co.*, 29 S. C. R. 211. (Refused).

Sect. 4.

Where the Crown is given statutory authority to revoke letters patent the bringing of an action by the Attorney-General for the forfeiture of letters patent does not clothe the Court with jurisdiction to restrain the Crown from the exercise of its power of cancellation: *Attorney-General* v. *Toronto Junction Recreation Club,* 8 O. L. R. 440.

Section 26 of the Ontario Judicature Act of 1897, conferred upon the High Court of Justice for Ontario "the like jurisdiction and powers as by the laws of England were on the 4th day of March, 1837, possessed by the Court of Chancery in England," . . . ss. 8, "to repeal and avoid letters patent issued erroneously, or by mistake, or improvidently or through fraud."

See the notes in Holmested & Langton's Judicature Act, 4th ed., page 18.

Formation of New Companies.

Companies incorporated for certain purposes.

5. (1) The Secretary of State of Canada may, by letters patent under his seal of office, grant a charter to any number of persons, not less than five, who apply therefor, constituting such persons, and others who have become subscribers to the memorandum of agreement hereinafter mentioned and who thereafter become shareholders in the company thereby created, a body corporate and politic, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, except the construction and working of railways or of telegraph or telephone lines, the business of insurance, the business of a trust company, the business of a loan company and the business of banking and the issue of paper money: Provided, however, that nothing in this part of the Act shall be construed to prevent companies incorporated thereunder from exchanging reciprocal contracts of indemnity against loss by fire or otherwise, under the plan known as inter-insurance. 7-8 Geo. V. c. 25. s. 3.

Exceptions.

Proviso.

Inter-insurance contracts.

No power to issue paper money or for banking.

2. Nothing in this Part shall be construed to authorize any company to issue any note payable to the bearer thereof or any promissory note intended to be circulated as money or as the note of a bank or to engage in the business of banking or insurance. 2 E. VII., c. 15, ss. 5 and 24.

Note regarding the power to incorporate companies.

Power to incorporate.

The power to incorporate companies is derived both by the Dominion Parliament and by the Provincial

Legislatures from the British North America Act. These two authorities (Dominion and Provincial) between them possess complete power to incorporate all companies; but grave questions arise respecting the distribution of that power between the two authorities. Sect. 5.

It has been determined with regard to the Legislative powers of the Dominion to incorporate companies that such authority belongs to it by virtue of its general power over all matters not coming within the class of subjects assigned exclusively to the Legislatures of the provinces, and the only subject on this head assigned to the Provincial Legislatures being the incorporation of companies with provincial objects, it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada: *Citizens' Insurance Company* v. *Parsons*, 7 App. Cas. 96; *Colonial Building and Investment Association* v. *Attorney-General of Quebec*, 9 App. Cas. 157; *Canadian Pacific Ry.* v. *Ottawa Fire Ins. Co.* (1908), 39 S. C. R. at 405. Cases.

From the realm of power to incorporate is first carved the exclusive power of the Provincial Legislatures to incorporate companies with provincial objects and the residue of the Legislative power to incorporate them remains with the Dominion Parliament. Between the two they exhaust the realm.

The extent of the powers of companies incorporated by provincial authority was elaborately considered in the case of *Canadian Pacific Railway Company* v. *Ottawa Fire Insurance Co.* (1908), 39 S. C. R. 405. The defendant company was incorporated under the Legislative authority of the Province of Ontario and had assumed to insure the property of the plaintiff in the State of Maine. The plaintiff among other claims sought a return of the insurance premiums paid by it to defendant company on the ground of no consideration, claiming that as the defendant company was incorporated by provincial legislation it was inherently subject to a constitutional limitation by which it was prohibited from making contracts to insure property outside of the province, by which it was incorporated.

Sect. 5.

The discussion turned principally on the interpretation of sub-section 11 of section 92 of the British North America Act which reads as follows:

"In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:

11. The incorporation of companies with provincial objects."

The Chief Justice in his dissenting judgment says:

"The jurisdiction of the Legislature by whose authority the company respondent was brought into existence is limited as to subjects and area. The subjects with respect to which it can legislate are enumerated in Section 92 of the British North America Act, 1867, and the area of its legislative jurisdiction is confined to the Province of Ontario," and this view is also taken by Mr. Justice Davies, who adds as a rider:

"It by no means follows that from this, however, that everything the company does beyond the area of the province within which it is limited to do business, in furtherance of or ancillary or incidental to its main objects or purposes, is necessarily *ultra vires.*" He adds that the objects and purposes of the company must be confined to the province, but necessary, subsidiary and incidental things may be done outside of the province strictly in furtherance of those objects.

Mr. Justice Duff holds that the word "objects" in s. 92, No. 11, is used to denote the purposes for which a company is established and that the main controversy turns on the meaning of the word "provincial."

The characteristic "provincial" which is to mark the objects of such a company is not necessarily, he thinks, to be found in every act or transaction of the company. The question is, would the business of a company constituted with such objects, regarded as a whole, fairly come within the description "provincial." If taken as a whole, a given undertaking would fall within the description "provincial," he does not know on what ground one could challenge the competence of the Legislature to constitute a company

having such an undertaking, or to invest its creature with such capacities and faculties as it should see fit, not of course incompatible with the character of its undertaking as a provincial undertaking.

After referring to the two decisions of the Privy Council which have touched upon this question of the respective jurisdictions of the Province and the Dominions, viz., *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96, and *Colonial Building Association* v. *Attorney-General*, 9 App. Cas. 157, he says, at p. 466:

"It is, however, important not to attribute to the language of the Judicial Committee a meaning more far reaching than that which it fairly conveys. And I do not think we can deduce from the judgment any broader principle than this—that a company authorized by its constitution to establish itself in any or all of the provinces of the Dominion and in any of those provinces to carry on the whole of its business or as much of it as it shall see fit, is not a company of the class to which the authority of the Provincial Legislatures, under the sub-section referred to, (No. 11), can be held to extend. The company whose Act of incorporation was under consideration, was, as we have seen, endowed with just such powers, and it was with reference to those powers that the expressions were used which I have quoted from the judgment. These expressions must, however, be read and construed with reference to that circumstance. We are not to seize upon the statement that only companies incorporated by the Parliament of Canada have the capacity to carry on their business throughout the Dominion, detach it from its context, from the subject matter under discussion, and imputing to it the broadest signification which it will bear, give effect to it in that sense as expounding "a binding rule of law."

Mr. Justice Maclennan and Mr. Justice Idington concur in the result arrived at by Mr. Justice Duff, expressing their opinions more unreservedly.

In *York County Loan and Savings Co.* (1908), 11 O. W. R. 507, the claim of certain Nova Scotia share-

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holders was that upon the proper construction of section 92 of the British North America Act, No. 11, the right of the York County Loan and Savings Company (being a company incorporated under the authority of the Province of Ontario), to transact its functional business was territorially limited to the Province of Ontario and that the acts done by that company in the Province of Nova Scotia were *ultra vires* of the charter powers of the company. After discussing the earlier cases, the learned Referee, Mr. Kappele, proceeds at p. 516:

"In other words, while a company incorporated by the province to carry on business, the subject matter of which is within the jurisdiction of the province, is only a corporation as of right in the province itself, as a matter of comity, it is a corporation and may do business wherever it is received by any other province, state or country. On principle, it does not seem that, taking the strictest view of the effect of the finding of the Privy Council in the cases so much discussed, there is anything to limit the rights which by comity a provincial company may exercise. The province incorporates a company to carry on a certain kind of business. It cannot by express grant in its charter give it the right to carry on that business anywhere outside of the province, but it can clothe it with all the powers of a legally created artificial person, which by comity but not by right may do business wherever the law of the province, state or country into which it seeks to go does not exclude it."

"I am also of the opinion that the province has an inherent right incidental to its sovereignty, as conferred upon it by Section 92 of the British North America Act, to incorporate companies with the powers and within the limits of its sovereignty. The incorporation of a company is, after all, not so much the exercise of a power as the right of a sovereign state to create instruments in the shape of artificial persons to carry on such commercial operations as its individuals and citizens have a right to carry on. What its citizens can do, and over which the province has control, it may

create and authorize an artificial person to do, and the powers of that artificial person are not territorially limited by anything contained in Section 92 of the B. N. A. Act conferring sovereign rights on the province." Sect. 5.

"In this view I think the province can create any company for commercial or business purposes, which are all in principle of a local or private nature and relate to property and civil rights in the province. What this artificial person when created by the province may do opens up other considerations. Such powers as it is given as are within the exclusive jurisdiction of the province it can clearly exercise. It may for other reasons and other purposes in its operations become subject to the laws of the Dominion, but it even then would remain a provincial company" . . .

"Every company has the right which its charter gives it as well as those rights which comity confers and recognizes, and a company legally incorporated and not limited as to territory by its own charter receives recognition as a matter of comity outside of its sovereign state." . . .

"In the result I do not think that the acts of any company that are outside of the territory of the province creating it, and which would otherwise be *intra vires*, are *ultra vires* unless the charter of the company or the statute under which the company may be incorporated, expressly limits its operations to a specified territory."

Citizens' Insurance Company v. Parsons (1882), 7 App. Cas. 96.

This was an action to recover against fire insurance companies on policies covering property and made in Ontario. By an Act of the Province of Ontario the contracts of all fire insurance companies respecting insurance in Ontario were made subject to certain conditions and provisoes set forth in the statute. The determination of the rights of the parties depended on the validity of this Provincial Act and its applicability to a Dominion company.

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"It was contended in the case of the Citizens' Insurance Company of Canada, that the company having been originally incorporated by the Parliament of the late Province of Canada, and having had its incorporation and corporate rights confirmed by the Dominion Parliament, could not be affected by an Act of the Ontario Legislature. But the latter Act does not assume to interfere with the constitution or status of corporations. It deals with all insurers alike, including corporations and companies, whatever may be their origin, whether incorporated by British authority as in the case of the Queen Insurance Company or by foreign or colonial authority and without touching their status, requires that if they choose to make contracts of insurance in Ontario relating to property in that province, such contracts shall be subject to certain conditions. It by no means follows that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion that it alone has a right to regulate its contracts in each of the provinces. The authority (to incorporate such a company) would belong to it by its general power over all matters not coming within the classes assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature being 'the incorporation of companies with provincial objects,' it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada." . . . (at pp. 113 and 114).

"But it by no means follows (unless indeed the view of the learned judge is right as to the scope of the words 'the regulation of trade and commerce') that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion that it alone has the right to regulate its contracts in each of the provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a company were

to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over 'property and civil rights in the province') that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body". (at p. 117). Sect. 5.

The principle of this case appears to be that while a Provincial Legislature has no power to interfere with the constitution or status of a dominion corporation it may validly regulate the contracts of such corporation made within its jurisdiction in relation to property and civil rights.

Dobie v. Temporalities Board (1882), 7 App. Cas. 136.

Held, that 22 Vict. c. 66 (of the Parliament of Canada), which created a corporation, having its corporate existence and rights in the Province of Ontario and Quebec, could not be repealed or modified by the Legislature of either province or by the conjoint operation of both, but only by the Parliament of the Dominion.

Held, further, that the Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66, and (1) to destroy a corporation created by the Canadian Parliament and substitute a new one; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the province, was invalid.

"The case of the *Citizens' Insurance Company of Canada* v. *Parsons* comes nearest in its circumstances to the present, as in that case the appellant company was incorporated by and derived all its statutory rights and privileges from an Act of the Province of Canada, whereas the Queen Insurance Company was incorpor-

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ated under the provisions of the British Joint Stock Companies Act, 7 & 8 Vict. c. 110. In both cases the validity of an Act of the Legislature of Ontario was impeached on the ground that its provisions were *ultra vires* of a provincial legislature and were not binding unless enacted by the Parliament of Canada. It was contended on behalf of the Citizen Insurance Company that the statute complained of was invalid in respect that it virtually repealed certain rights and privileges which they enjoyed by virtue of their Act of incorporation. That contention was rejected, and the decision in that case would be a precedent fatal to the contention of the appellant if the provisions of the Ontario Act, 39 Vict. c. 31, and the Quebec Act, 38 Vict. c. 64, were of the same or substantially the same character. But upon an examination of these two statutes it becomes at once apparent that there is a marked difference in the character of their respective enactments. The Ontario Act merely prescribed that certain conditions should attach to every policy entered into or in force for insuring property situate within the province against the risk of fire. It dealt with all corporations, companies and individuals alike who might choose to insure property in Ontario—it did not interfere with their constitution or status, but required that certain reasonable conditions should be held as inserted in every contract made by them. The Quebec Act, 38 Vict. c. 64, on the contrary deals with a single statutory trust and interferes directly with the constitution and privileges of a corporation created by an Act of the province of Canada and having its corporate existence and corporate rights in the province of Ontario as well as in the province of Quebec. The professed object of the Act and the effect of its provisions is not to impose conditions on the dealings of the corporation with its funds within the province of Quebec, but to destroy, in the first place, the old corporation and create a new one, and, in the second place, to alter materially the class of persons interested in the funds of the corporation." (At pp. 148 and 149.)

The Colonial Building and Investment Association v. The Attorney-General of Quebec (1883-4), 9 A. C. 157. Sect. 5.

This was a proceeding to have it declared that the company which was incorporated by an Act of the Parliament of Canada had been illegally incorporated and should be dissolved, because the statute incorporating it was *ultra vires* of the Parliament of Canada. In the course of its judgment the Court says: "It is asserted in the petition, and was argued in the Courts below, and at this bar, that inasmuch as the association had confined its operations to the Province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the provincial legislature. But surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion Parliament. The company was incorporated with powers to carry on its business consisting of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation, nor warrant the judgment prayed for, viz., that the company be declared to be illegally constituted." (At p. 165.)

In the course of the judgment the Court affirms the observations made in *Citizens' Insurance Company* v. *Parsons* as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of companies, and adds that in the illustration used in the case of *Citizens' Insurance Company* v. *Parsons* the object was merely to point out that a corporation could only exercise its powers subject to the law of the province whatever it might be in this respect.

The points of this case are three:

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(1) Affirmance of *Citizens' Insurance Company* v. *Parsons* as to the power of the Dominion to create a corporation with power to carry on business throughout all Canada.

(2) The fact that such a corporation confines the exercise of its powers to one province and to local and provincial objects does not affect its status as a corporation or operate to render its original incorporation illegal as being *ultra vires* of the Parliament of Canada.

(3) In *Canadian Pacific Railway* v. *Ottawa Fire* (1906-8), 39 S. C. R. 405, Mr. Justice Duff, after discussing this decision, says: "I do not think we can deduce from the judgment any broader principle than this—that a company authorized by its constitution to establish itself in any or all of the provinces of the Dominion, and in any of those provinces to carry on the whole of its business or as much of it as it shall see fit, is not a company of the class to which the authority of the provincial legislatures under the sub-section referred to, (No. 11), can be held to extend." (At p. 466).

Corporation of the City of Toronto v. Bell Telephone Company of Canada (1905), A. C. 52.

The Bell Telephone Company claimed the right under their incorporating Acts, which were passed by the Dominion Legislature, to enter upon the streets and highways of the corporation of Toronto and to construct conduits or cables thereunder or to erect poles and affix wires thereto upon or along such streets or highways without the consent of the city.

The judgment is delivered by Lord Macnaghten: "The British North America Act, 1867, in the distribution of legislative powers between the Dominion Parliament and provincial legislatures, expressly excepts from the class of 'local works and undertakings' assigned to provincial legislatures 'lines of steam or other ships, railways, canals, telephones, and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province': sec. 92, sub-sec. 10 (a).

Section 91 confers on the Parliament of Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company, the objects of which as defined by its Act of incorporation contemplate extension beyond the limits of one province, is just as much within the express exception as a telegraph company with like powers of extension. It would seem to follow that the Bell Telephone Company acquired from the legislature of Canada all that was necessary to enable it to carry on its business, in every province of the Dominion, and that no provincial legislature was or is competent to interfere with its operations, as authorized by the Parliament of Canada." (At pp. 56, 57.) Sect. 5.

The Court also affirmed the view expressed in *Colonial Building* v. *Attorney-General of Quebec.*

John Deere Plow Co. v. Wharton (1914), 18 D. L. R. 353; (1915) A. C. 330; 84 L. J. P. C. 64.

"The power of legislating with reference to the incorporation of companies with other than provincial objects must belong exclusively to the Dominion Parliament, for the matter is one 'not coming within the classes of subjects' 'assigned exclusively to the legislature of the provinces,' within the meaning of the initial words of sec. 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression 'the peace, order and good government of Canada.' "

"Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens' Insurance Co.* v. *Parsons,* 7 A. C. at pp. 112, 113, on head 2 of sec. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression, ' property and civil rights in the province ' in sec. 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable,

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and what limitations should be placed on such powers." (18 D. L. R. 359, 360).

See also *Attorney-General for Ontario* v. *Attorney-General for Canada.* (*The Companies Case*) (1916) 85 L. J. P. C. 127; (1916) 1 A. C. 598; (1916) 26 D. L. R. 293.

Attorney-General for Canada v. Attorneys-General for Alberta, Manitoba, etc. (The Insurance Case) (1916) 85 L. J. P. C. 124; (1916) 1 A. C. 588; (1916) 26 D. L. R. 288.

"Where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect operative apart from further authority, the Dominion Government can incorporate it with such rights and powers, to the full extent explained by the decision in the case of the *John Deere Plow Co.*, 18 D. L. R. 353, (1915) A. C. 330." (26 D. L. R. 292).

After referring to and epitomizing the more important cases it will be well to state briefly the principles.

Principles.

Principles.

1. The Dominion Parliament possesses the exclusive jurisdiction to incorporate companies with powers to carry on business throughout the Dominion. The incorporation of companies with objects other than provincial falls within the general powers of the Parliament of Canada, that is to say, the power is grounded upon the opening initiatory clause of section 91 of the British North America Act.

2. The Dominion Parliament cannot empower companies incorporated by it to carry on business in any province except subject to and consistently with the laws of that province.

3. But if the business of the company is such that power to make laws in relation to it belongs exclusively to the Dominion Parliament, then the powers and authority conferred on the company by the Dominion Par-

liament cannot be lessened by provincial authority and are superior to provincial authority. Sect. 5.

4. The fact that the company incorporated under an act of the Dominion Parliament with power to carry on its business throughout the Dominion confines the exercise of its powers to one province cannot affect its status or capacity as a corporation.

5. A company incorporated under Dominion legislation can exercise no power which its creator could not directly exercise. Its acts of incorporation may confer corporate capacity merely and powers in relation to matters within the legislative competence of the Federal Parliament.

6. The status and corporate capacity of a provincial company are determined by its act of incorporation. Its powers must come from that legislature which has jurisdiction over the subject matter of such powers. The character of the actual powers and rights which the provincial government can bestow is limited to powers and rights exercisable within the province. But a company incorporated by letters patent under the Ontario Act has, in addition, capacity to accept extra-provincial powers and rights: *Bonanza Creek, &c., Co.* v. *The King* (1916) 1 A. C. 566. As to companies incorporated by memorandum and articles, see the same case at p. 584, and *Weyburn Townsite* v. *Honsberger* (1918) 43 O. L. R. 451; (1919) 45 O. L. R. 176; *Honsberger* v. *Weyburn Townsite* (1920) 50 D. L. R. 147. Provincial companies are subject to the Dominion Winding-up Act, and they must observe the requirements of Federal law as to navigation and shipping: *Queddy R. Boom Co.* v. *Davidson*, 10 S. C. R. 222.

7. In the absence of Federal legislation, they are subject to provincial law regulating the trade they carry on.

6. The Governor-in-Council may, from time to time, designate the seal of office to be used by the Secretary of State as the seal under which letters patent may be granted under this Act. 2 Ed. VII. c. 15, s. 5. Seal.

7. The applicants for such letters patent, who must be of the full age of twenty-one years, shall file in the Department of the Application.

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Secretary of State an application setting forth the following particulars:—

Name. (*a*) The proposed corporate name of the company, which shall not be that of any other known company, incorporated or unincorporated, or any name liable to be confounded therewith, or otherwise, on public grounds, objectionable;

Purposes. (*b*) The purposes for which its incorporation is sought;

Chief place of business. (*c*) The place within Canada which is to be its chief place of business;

Capital. (*d*) The proposed amount of its capital stock;

Shares. (*e*) The number of shares and the amount of each share;

Applicants. (*f*) The names in full and the address and calling of each of the applicants, with special mention of the names of not more than fifteen and not less than three of their number, who are to be the first or provisional directors of the company;

Stock taken and amount paid. (*g*) The amount of stock taken by each applicant, the amount, if any, paid in upon the stock of each applicant, and the manner in which the same has been paid, and is held for the company. 2 E. VII., c. 15, s. 6.

Application without purpose of gain. 7A. (1) When the application is for the creation of a corporation to carry on in more than one province of Canada, without pecuniary gain, objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional, or sporting character, or the like, the applicants for such letters patent, who must be of the full age of twenty-one years, shall file in the Department of the Secretary of State an application setting forth:—

Name. (*a*) The proposed corporate name, which shall not be that of any other known corporation, association or body incorporated or unincorporated, or any name liable to be confounded therewith, or otherwise, on public grounds, objectionable;

Purposes. (*b*) The purposes for which incorporation is sought;

Chief place of business. (*c*) The place within Canada where its chief office is to be situated;

Applicants. (*d*) The names in full and the address and calling of each of the applicants with special mention of the names of not more than fifteen and not less than three of their number, who are to be the first or provisional directors or trustees of the corporation

Memorandum of Agreement. (2) The application shall be accompanied by a memorandum of agreement, in duplicate, which shall set out the by-laws or regulations of the corporation and shall, more particularly, provide by-laws or regulations upon the following matters:—

Terms of admission. (*a*) Conditions of membership, including societies or companies becoming members of the corporation;

(*b*) Mode of holding meetings, rights of voting and of making, repealing or amending by-laws or regulations; Meetings.

(*c*) Appointment and removal of the directors, trustees, committee or officers, and their respective powers and remuneration; Directors, Committee, Officers.

(*d*) Provision for audit of accounts and appointment of auditors; Audit of accounts.

(*e*) Determination whether or how members may withdraw from the corporation; Withdrawal of members.

(*f*) Provision for custody of seal and certifying of documents issued by the corporation Seal.

(3) Any of the by-laws or regulations the applicants desire may be embodied in the letters patent but in such case shall not be repealed or amended, except by the issue of supplementary letters patent. By-laws.

(4) By-laws or regulations not embodied in the letters patent may be repealed or amended, but such variation or amendment shall not be in force or acted on until the approval of the Secretary of State of Canada has been obtained. Amendment of by-laws.

(5) Any existing corporation created by or under any Act of the Parliament of Canada for any of the objects mentioned in subsection (1) of this section may apply under this section for the issue of letters patent creating it a corporation under those provisions of Part I of this Act which apply to corporations created under this section, and upon the issue of such letters patent the said provisions shall apply to the corporation created thereby. Existing corporations.

(6) 1. The following provisions of Part I. of this Act shall not apply to corporations created under this section, namely, sections 7, 7B, 8, 9, 26, 33, 38 to 43, both inclusive, 43A to 43D, both inclusive, 45 to 54, both inclusive, 54A to 54F, both inclusive, 55 to 68, both inclusive, 68A, 70 to 78, both inclusive, 80 to 84, both inclusive, 86 to 88, both inclusive, paragraphs (*d*) and (*e*) of section 89, section 90, 94A to 94C, both inclusive, 101 to 104, both inclusive, paragraphs (*j*) and (*k*) of subsection 2 of section 105, and sections 114, 115. Application of R. S., c. 79.

2. The others sections of Part I of this Act shall apply to corporations created under this section.

(7) In applying to corporations created under this section those sections of Part I of this Act which apply to such corporations:— Interpretation.

(*a*) the word "company" shall be deemed to mean a corporation so created; "Company."

(*b*) the word "shareholder" shall be deemed to mean a member of such a corporation; "Shareholder."

(*c*) a provision that the votes of shareholders representing a specified proportion in value of the stock of a company shall be requisite for any purpose shall be deemed to "Proportion in value of stock."

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mean that the votes of a like proportion are requisite for that purpose. 7-8 Geo. V. c. 25, s. 4.

Issue of shares without nominal or par value.

7B (1) Upon the formation or reorganization of any company, the letters patent may provide for the issue of the shares of the capital stock of such company without any nominal or par value, except in the case of preferred stock having a preference as to principal; and,

Statement as to preferred stock.

(*a*) If such preferred stock or any part thereof has a preference as to principal, the letters patent shall state the amount of such preferred stock having such preference, the particular character of such preference, and the amount of each share thereof, which shall be five dollars or some multiple of five dollars, but not more than one hundred dollars; and,

Statement as to capital.

(*b*) The letters patent shall set out the amount of capital with which the company will carry on business, which amount shall be not less than the amount of preferred stock (if any) authorized to be issued with a preference as to principal, and in addition thereto a sum equivalent to five dollars or to some multiple of five dollars for every share authorized to be issued other than such preferred stock; but in no event shall the amount of such capital be less than five hundred dollars.

(2) Such statement in the letters patent shall be in lieu of any statements prescribed by this Act as to the amount or the maximum amount of the capital stock or the number of shares into which the same shall be divided, or the amount or the par value of such shares.

Equality of shares.

(3) Each share of the capital stock without nominal or par value shall be equal to every other share of the capital stock, subject to the preferences given to the preferred shares, if any, authorized to be issued. Every certificate of shares without nominal or par value shall have plainly written or printed upon its face the number of such shares which it represents and the number of such shares which the company is authorized to issue, and no such certificate shall express any nominal or par value of such shares. The certificates of preferred shares having a preference as to principal shall state briefly the amount which the holder of any of such preferred shares shall be entitled to receive on account of principal from the surplus assets of the company in preference to the holders of other shares, and shall state briefly any other rights or preferences given to the holders of such shares.

Shares to be allotted at price fixed by Board or Letters Patent.

(4) The issue and allotment of shares authorized by this section, other than shares of preferred stock having a preference as to principal, may be made for such consideration as may be prescribed in the letters patent, or as may be fixed by the board of directors pursuant to authority conferred in the letters

patent, or if the letters patent do not so provide, then by the consent of the holders of two-thirds of each class of shares then outstanding given at a meeting called for that purpose in such manner as is prescribed by the by-laws. Any and all shares issued as permitted by this section shall be deemed fully paid and non-assessable and the holder of such shares shall not be liable to the company or to its creditors in respect thereof.

Commencement of business; authorized debts.

(5) A company to which this section applies shall not begin to carry on business nor incur any debts until the amount of capital stated in the letters patent has been fully paid in money, or in property taken at its actual value. In case the amount of capital stated in the letters patent is increased as provided by this Act, such company shall not increase the amount of its indebtedness then existing until it has received in money or property the amount of such increase of its stated capital. Any of the directors of the company who assent to the creation of any debt in violation of this section shall be liable jointly and severally for such debt; but no action shall be brought against any director unless within one year after the debt has been incurred the creditor has served upon the director written notice of intention to hold him personally liable for such debt.

Commencement of business.

(6) A company to which this section applies shall not be subject to section 26 of this Act

Limitation of dividends.

(7) A company to which this section applies shall not declare any dividend which reduces the amount of its capital below the amount stated in the letters patent as the amount of capital with which the company will carry on business. In case any such dividend shall be declared the directors in whose administration the same shall have been declared, except those who may have caused their dissent therefrom to be entered upon the minutes of such directors at the time, or who were not present when such action was taken, shall be liable jointly and severally to such company and to the creditors thereof to the full amount of any loss sustained by such company or by its creditors respectively by reason of such dividend. 7-8 Geo. V. c. 25, s. 4.

Form of application.

8. The application shall be in accordance with form A in the schedule to this Act and may ask to have embodied in the letters patent then applied for, any provision which could under this Part be contained in any by-law of the Company or of the directors approved by a vote of shareholders, which provision so embodied shall not, unless power is given therefor in the letters patent, be subject to repeal or alteration by any by-law. 2 E. VII., c. 15, s. 7.

Memorandum of agreement.

9. The application shall be accompanied by a memorandum of agreement in duplicate under seal which shall be in accord-

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ance with form B in the schedule to this Act. 2 E. VII., c. 15, s. 7.

Condition precedent to issuing of letters patent to be established.

10. Before the letters patent are issued the applicants shall establish to the satisfaction of the Secretary of State the sufficiency of their application and memorandum of agreement and the truth and sufficiency of the facts therein set forth, and that the proposed name is not the name of any other known incorporated or unincorporated company or one likely to be confounded with any such name; and for that purpose the Secretary of State shall take any requisite evidence in writing by oath or affirmation or by solemn declaration and shall keep of record any such evidence so taken. 2 E. VII., c. 15, s. 7.

Procedure for incorporation.

1. Who may apply.
2. The application.
   - (a) Name.
   - (b) Objects.
   - (c) Head office.
   - (d) Capital.
   - (e) Shares.
   - (f) Applicants.
   - (g) Stock taken.
3. Execution of petition.
4. Memorandum of agreement.
5. Proof in support of application.
6. Fees.

Promoters.

Liability on shares.

Organization.

Corporations without share capital (s. 7A).

Shares without par value (s. 7B).

Note on nature and characteristics of joint stock companies.

Joint stock companies as distinguished from other corporations.

Procedure for incorporation.

Procedure for incorporation.

Incorporation under the Act is obtained by petition, in accordance with form 'A,' set out in the schedule to the Act accompanied by a memorandum of agreement

in duplicate, in accordance with form 'B' in the schedule. Secs. 7-10.

1. Who may apply for incorporation.

The Act, s. 7, requires that the applicants be of the full age of twenty-one years. Aliens are not excluded. Applicants who may apply.

The number of applicants must not be less than five, Each applicant must, of course, be a shareholder, though there is no provision in the Act as to the number of shares to be held by each. It would seem that it is not illegal to form a so-called "one man" company, so long as all the requirements of the Act under which incorporation is obtained are complied with: *Salomon* v. *Salomon* [1897] A. C. 22, and see *Lagunas, etc., Co.* v. *Lagunas Syndicate* [1899] 2 Ch. 392; and promoters of a company are not bound to provide it with an independent board of directors, if the real truth is disclosed to those who are induced to join the company, per Lindley, M.R., at p. 426. See on the same point *Wood* v. *Reesor* (1895), 22 A. R. 57; *Rielle* v. *Reid* (1899), 26 A. R. 54.

Original subscribers to a company must be persons *sui juris;* if the applicants form only the minimum number, the infancy of one prevents the company acquiring legal existence and this defect is incurable; *Quære* as to married women: *Hamilton & Flamborough Road Co.* v. *Townsend* (1887), 13 A. R. 534.

2. The application.

The application must set out—

(a) The proposed corporate name of the company which shall not be that of any other known company, incorporated or unincorporated, or any name liable to be confounded therewith, or otherwise, on public grounds, objectionable, s. 7 (a). Name.

It is always advisable, before forwarding the application, to make enquiry from the Department whether the proposed name is acceptable. While the Secretary of State may give to the company a corporate name different from the one applied for, the practice is for the Department to advise the solicitor for the appli-

Secs. 7-10. cants when the proposed name will not be granted, so that another may be selected.

It is also advisable that the name be as short as possible.

"If the name of the proposed company is that of an existing partnership, there must be a written consent to the use of the name, signed by all the members of the partnership, duly verified, and accompanied by an affidavit that the signatories are all the members of the partnership. If the proposed name contains the names of individuals who are not applicants for incorporation, written consents, verified by affidavits of execution, of all such persons should be filed." (Departmental Regulations).

"Extract from an Order-in-Council dated March 29, 1909:—

"The use of the term 'Imperial,' or other title signifying Royal or Government support or patronage, such as 'Crown,' 'King's,' 'Queen's,' &c., shall not be allowed unless there is some real Imperial or Crown connection which gives a well-founded claim to recognition, or unless it can be shown on clear evidence that there is a long and *bona fide* user, and the name is so used as not to convey any suggestion of government support or patronage. Such user must be shown to have commenced prior to the 29th March, 1909." (Extract from Departmental Regulations).

The use of the words 'Dominion' or 'Canadian' will also be refused if government support or patronage is indicated.

The 'name' of the company is further considered in the notes to s. 21.

Objects. (b) The purposes for which incorporation is sought.

Great care is requisite in order to embody with all necessary fulness in the petition for incorporation the objects of the company. This is still the proper practice, notwithstanding the doubt that has recently been cast on the applicability of the doctrine of *ultra vires* to Dominion companies, which question is further considered below in the notes to s. 29.

The point under consideration is thus treated by Palmer in his work on Company Law (1911) at page 31:— Secs. 7-10.

'To sum up, experience shows that it is better in stating the objects to be explicit, and thus to preclude as far as practicable the doubts and difficulties which inevitably arise on the construction of a very concise statement of objects. Hence the somewhat elaborate statements of objects now so commonly found. These clauses may, and undoubtedly do in some cases, err by excess of detail; but over-elaboration is better than over-conciseness. Nothing is more annoying to those who have to manage a company than to find that the powers of the company are fettered or questioned, and its business impeded or prejudiced simply because the draftsman of the memorandum of association has framed it without sufficient foresight or judgment, and has, contrary to the fact, assumed that the ordinary business man is familiar with the legal and somewhat conflicting decisions as to the powers which may be implied by a concise specification of objects.'

'The objects clause, then, must be drawn in clear and well considered terms, and must on no account omit any of the clauses which experience has shown are or may be required for the working of the business.'

The first step to be taken in drafting the objects clauses is to consider the provisions of the Act which specifically confer certain powers and specifically exclude others.

Powers expressly given by the statute ought not to be repeated in the charter. Powers that are expressly excluded by the statute cannot in any way be obtained. As to the powers conferred by the Act, see the notes to s. 29.

Hence both these classes of objects or powers should be omitted, but any permissible objects which are not expressly conferred by the statute and which are or may be necessary or desirable for the working of the undertaking should be carefully embodied in the petition or memorandum.

"Applications for the incorporation of companies with power to act as a trustee, or of a loan company,

Secs. 7-10.

are not entertained by the Department since the enactment of the Trust Companies Act, 4-5 Geo. V. c. 55, and the Loan Companies Act, 4-5 Geo. V. c. 40.'' (Departmental Regulations.)

Useful clauses to be inserted in charter.

The following are recommended as some of the general clauses and powers which experience has shown it is desirable to insert in a charter:

1. A clause authorizing the company to carry on the particular business which it is proposed to carry on.

2. A clause empowering the company to acquire any other business similar to its own, for it is extremely difficult to imply such a power: *Ernest* v. *Nicholls* (1857) 6 H. L. C. 401.

3. A clause empowering the company to enter into any agreement for sharing profits, joint adventure, reciprocal concession, or other arrangment of a like nature with other persons or companies carrying on any similar business; for very clear powers are necessary to justify such transactions: *Ex parte British Nation, etc., Association* (1878) 8 C. D. 679.

4. A clause empowering the company to take shares and securities in other companies. Here, again, clear powers are necessary: *Barned's Banking Co.* (1867) L. R. 3 Ch. 105; *Lands Allotment Co.* [1894] 1 Ch. 616.

5. A clause empowering the company to promote other companies to acquire the company's undertaking or for any purpose calculated to benefit the company. This power, though often required, cannot be implied: *Joint Stock Discount Co.* v. *Brown* (1869) L. R. 8 Eq. 381.

6. A power to lend money and guarantee the performance of contracts by customers and others. These loan and guarantee transactions are constantly called for in business, and yet the power is one not easily implied.

7. A power to sell and dispose of the undertaking of the company for shares, debentures or securities of any other company having objects altogether, or in part, similar to those of this company. In the absence

of an express power like this, a company cannot sell or dispose of its whole business: *Simpson* v. *Westminster Palace Hotel Co.* (1860), 8 H. L. C. 712; but, if the power is inserted, it is effective: *Cotton* v *Imperial, etc. Co.* [1892] 3 Ch. 454; *New Zealand, etc. Co.* v. *Peacock* [1894] 1 Q. B. 622. Secs. 7-10.

8. A power to apply for an act of Parliament for any purpose which may seem expedient. Without such an express power a company cannot apply its funds in promoting a bill to effect any modification in its constitution: *Munt* v. *Shrewsbury, etc. Ry. Co.* (1850) 13 Beav. 1; *Simpson* v. *Dennison* (1852) 10 Hare 51; *Vance* v. *East Lancashire Ry. Co.* (1856) 3 K. & J. 50.

9. Power to pay out of the funds of the company the costs of organization and promotion.

10. A power upon any issue of shares to employ brokers and pay commissions.

11. A power to sell, improve, manage, develop, etc., all or any part of the property and rights of the company.

12. A power to lend money to customers, etc.

13. A power to apply for patents, licenses, concessions, and the like.

14. A power to distribute assets in specie.

15. A power to amalgamate with any other company whose objects are similar.

16. A power to carry on any business capable of being conveniently carried on in connection with the company's business.

17. A power to draw, make, etc., promissory notes and other negotiable instruments.

18. A power to enter into arrangements with any governments or authorities.

19. A power to establish associations, institutions, etc., to benefit employees.

20. A power to purchase, take on lease, etc., any real or personal property, etc.

21. A power to invest moneys of the company not immediately required.

22. A power to make the company's product known by advertising, etc.

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23. A power to do any of the things enumerated in the objects as principals, agents, etc.

24. A power to do all things incidental to the objects enumerated.

In certain jurisdictions the departmental regulations and principles are not liberal in the direction of conferring such powers on proposed companies and in some the rule prevails of limiting the company to one single principal object with such incidental and subsidiary powers only as are strictly and properly essential to the fulfilment of that one principal object.

This rule is believed to be founded on the policy of preventing supposed frauds, but it is submitted that where any real impropriety is contemplated this policy is powerless to prevent it, and that on the other hand it frequently operates to hamper legitimate and honest enterprise.

Head office.

(c) The place within Canada which is to be the chief place of business—

The Departmental regulations state that if the operations of a Company are to be carried on in a township or district, the name of the nearest post office should be given.

Capital.

(d) The proposed amount of its capital stock.—

The capital referred to is the authorized capital.

Preference shares—If it is desired that the provisions governing the issue of preference shares should not be capable of alteration by by-law, or if it is desired to make preference shares redeemable by the company, the provisions should be set out in the petition and appear in the letters patent. See further the note on preference shares, s. 47.

Share warrants.

If the power to issue share warrants is desired, it must be asked for in the application, s. 68A, and the practice of the Department is to require the regulations as to share warrants to be set out in the application.

Shares.

(e) The number of shares and the amount of each share—

The usual par value of shares is one hundred dollars, but it may be fixed as low as five dollars or one dollar. Secs. 7-10.

(f) The names in full and address and calling of each of the applicants, specifying such of them as are to be the provisional directors. Applicants.

The names must be given in full. Initials only will not suffice, unless the initial letter is used along as part of the name, in which case that fact should be set out in the affidavit of the witness (Departmental Regulations.)

As the provisional directors must be replaced by an equal number of permanent directors, it is necessary to determine the number of permanent directors desired to avoid the necessity of passing a by-law to increase or reduce the board. See ss. 72 ff.

Section 72 has been amended by removing the former restriction of the maximum number of directors to fifteen. Section 7 (f) had not been similarly amended so that if the permanent board is to exceed fifteen, a by-law to increase the board is apparently necessary.

(g) The amount of stock taken by each applicant, the amount, if any, paid in upon the stock of each applicant, and the manner in which the same has been paid, and is held for the company. Stock taken.

It is usual for each applicant to subscribe for one share, and that no payment should be made thereon before incorporation.

3. Execution of Petition.

" The petition must be signed by each of the applicants in person, and in the presence of a witness. An applicant should not be a witness. If it is impracticable for the applicant to sign in person, he may sign by an Attorney, but the original Power of Attorney, or a duly authenticated notarial copy thereof, must be produced. Such Power of Attorney should be specific. Applications made under general Power of Attorney cannot be accepted. Each signature should be verified by an affidavit, or statutory declaration, made by the witness thereof " (Departmental Regulations.) Execution of petition.

Secs. 7-10.

The form of affidavit is attached to the blank petitions obtainable from the Department.

4. Memorandum of Agreement.

Memorandum of Agreement.

The application must be accompanied by a memorandum in duplicate, in Form B in the schedule to the Act, executed *under seal* by each of the applicants.

"A memorandum of agreement made up of two sheets of paper, one setting out the undertaking by itself and the other bearing all the signatures by themselves, cannot be accepted. There should be at least two signatures on the sheet setting out the undertaking.

"If the application asks for special provisions in the Letters Patent, such, for instance, as an issue of preference shares, and the signatories of the memorandum of agreement are more numerous than of the petition, the memorandum of agreement should contain the special provisions asked for in the petition." (Departmental Regulations).

5. Proof Required in Support of Application.

Proof required in support of application.

"(a) An affidavit or statutory declaration establishing the sufficiency of the petition and of the Memorandum of Agreement and Stock Book, and the truth and sufficiency of the facts therein stated, also that the proposed name of the Company is not that of any other known incorporated or unincorporated company...."

Stock book.

"(b) Affidavit or statutory declaration verifying the signatures to the Petition and Memorandum of Agreement and Stock Book.

"The proof required with reference to the truth and sufficiency of the facts stated in the petition and memorandum, and with respect to the proposed corporate name, may be made by an affidavit or affirmation, or statutory declaration of any of the petitioners or their Attorney or Agent, who should be a resident of the Dominion of Canada." (Departmental Regulations.)

6. Fees.

Fees.

The proper fee according to the tariff should be forwarded with the petition. The tariff of fees is set

out under s. 24 at p. 63. The Act provides that no steps shall be taken by the Department towards the issue of any letters patent until after all fees therefor are duly paid. Fees are required to be paid in cash or by an accepted cheque made payable to the order of the Secretary of State, and should be transmitted to him by registered letter. Secs. 7-10.

Promoters.

Another point to be considered by those responsible for the incorporation of a company is the liability of the promoters and the rules of law relating to the prospectus of the company. For a discussion of this question, the reader is referred to the notes to s. 43. Promoters.

Liability on Shares.

It is of the utmost importance to see that shares issued as fully paid by a company, and accepted as the purchase price of property sold to the company, are really fully paid-up; in other words, to see that a shareholder who pays for his shares with property, intending that his shares shall thus be fully paid, does not still remain under liability to pay a further sum in respect of such shares. Liability on shares.

The general rule is that shares in a joint stock company can only be issued in the first instance *at their full value*. There is no power to dispose of the shares of a corporation at less than their par value. This is necessary in order to insure that the nominal capital of the company shall be a reality and not a sham. Nothing but payment, and payment in full, can put an end to the liability of the shareholder, but though the shares must be paid for, and paid for in full, there is no general law apart from statute to prevent the issue of such shares credited as paid-up in consideration of property or services made over or rendered to the company. This is the law as settled in England; see the following cases: *Re Baglan Hall Co.* (1870) L. R. 5 Ch. 346; *Pell's Case* (1870) L. R. 5 Ch. 11; *Elkington's Case* (1867) L. R. 2 Ch. 511; *Pellatt's Case* (1867) L. R. 2 Ch. 527.

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It is also held in England that where shares are issued as paid-up upon the footing that certain specific property shall be accepted by the company as a consideration for such issue, the Court will not, whilst the contract stands, inquire into the value of the consideration, even at the instance of the liquidator: *Pell's Case* (1870) L. R. 5 Ch. 11; *Re Baglan Hall Co.* (1870) L. R. 5 Ch. 346; *In re Wragg, Limited* (1897) 1 Ch. 796.

Organization.

Organization.

The procedure for organizing a company incorporated under the Act is as follows:

1. A meeting of the provisional directors is called. These are usually clerks in the office of the company's solicitor. At this meeting the letters patent of the company are read; the shares subscribed for in the memorandum of agreement are allotted, and paid in full. Notices are directed to be sent for a shareholders' meeting called for the purpose of organizing the company, electing directors, passing general by-laws, including a borrowing by-law, a by-law to permit the purchasing of shares in other companies and to transact such other business as may be desirable. The meeting then adjourns.

2. The meeting of shareholders approves the proceedings of the provisional directors. The provisional directors are elected permanent directors, the election being by ballot. The convenient course is to re-elect the provisional directors. It must be remembered that the provisional directors must be replaced by the same number of permanent directors. The meeting then adjourns until after the meeting of the permanent directors which is held forthwith to pass the by-laws.

3. The permanent directors meet, pass the by-laws, elect officers, approve the form of share certificate and corporate seal and then adjourn.

In connection with the borrowing by-law usually passed at this meeting it should be observed that most of the Banks require a by-law in the special form approved by the bank. Accordingly it is advisable to ascertain the name of the bank with which the company

proposes to conduct its banking business. Unless the company proposes to borrow money by mortgage or an issue of bonds, debenture stock, notes or similar securities, no additional borrowing by-law will usually be required; and in cases where such borrowing is proposed it may either be authorized by a general by-law passed pursuant to section 69 or a specific by-law authorizing the security in question may be passed. Secs. 7-10.

If there is to be an issue of preference shares a by-law creating the issue may be passed at this stage.

4. The adjourned meeting of shareholders reassembles, ratifies the by-laws and adjourns.

5. The permanent directors meet and resign in succession in favor of the persons who are to act as the actual and continuing directors of the company. Each director as he resigns transfers the share of stock held by him to his successor who takes his place on the board. The usual qualification of a director prescribed by the by-laws is the holding of one share and it is accordingly unnecessary to allot further shares to the incoming directors. If the by-laws provide, as they should, that the directors may appoint officers by resolution, the new board appoints officers for the ensuing year. The meeting then adjourns.

Various other matters will require attention at subsequent meetings of the directors. A prospectus or a statement in lieu of a prospectus will have to be prepared, signed by all the directors and filed in the office of the Secretary of State, s. 43.

Minimum subscription.

The amendment of 1917, 7-8 Geo. V. c. 23, s. 7, requires the prospectus to state the minimum subscription on which the directors may proceed to allotment; and the statement in lieu of prospectus (where no prospectus is issued) to state "the minimum subscription (if any) fixed by the letters patent, supplementary letters patent or by-laws on which the company may proceed to allotment" (Form F as amended by 8-9 V. c. 24).

These provisions are adapted from the Imperial Companies (Consolidation) Act, but the Dominion Act does not contain any provision similar to s. 85 of the Imperial Act which forbids the directors in

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the case of the first allotment of any share capital offered to the public for subscription, or where there is no invitation to the public in the case of the first allotment of share capital payable in cash, from making any allotment, until the amount (if any) fixed by the memorandum or articles and named in the prospectus (where there is a public offer) or in the statement in lieu of a prospectus (where there is no public offer) as the minimum subscription on which the directors may proceed to allotment; or if no amount is so fixed and named, then the whole amount offered for subscription or payable in cash has been subscribed and the amount payable on application (being not less than five per cent.) has been paid to and received by the company. Consequently it is difficult to see the object of the present provision in the Dominion Act. In any event it is advisable to state the amount of the minimum subscription in the general laws, and not in the letters patent. To state a nominal amount, viz., one share, is not unusual and is a compliance with the statutory provision.

Purchase of property.

If the company is acquiring property from a vendor a by-law should be passed authorizing the purchase and a contract of sale and purchase considered and approved. The by-law should provide for its submission to the shareholders for ratification, the execution of the contract by the officers and the payment of the consideration and allotment of shares (where such form a part of the consideration) on confirmation by the shareholders and the execution and delivery of the conveyances or transfers of the property to be acquired. If any director is interested in the sale to the company he must make full disclosure of his interest and refrain from voting, and it is important that the by-laws should be properly framed to protect a director contracting with the company who makes disclosure and does not vote. This point is further considered in the notes to s. 80.

If the company's shares or securities are to be sold to the public through a broker or underwriter the execution of a formal contract should be authorized.

Where extensive dealing in the company's shares is anticipated a registrar and transfer agent should be appointed. For the requirements of registrars and transfer agents, see the notes to s. 64. Secs. 7-10. Transfer agent.

The by-laws should provide that the place of the principal office of the company is to be situate in a designated city or town and at such place therein as the directors may from time to time by resolution appoint. The directors should pass the necessary resolution and cause to be inserted in the *Canada Gazette* the notice required by s. 30. Head office.

The company is forbidden to commence its operations or incur any liability before ten per centum of its authorized capital is subscribed and paid for, s. 26. Operations.

The first auditors of the company may be appointed by the directors and their remuneration fixed, or the appointment left till the first annual meeting, s. 94A. Auditors.

In addition to books of account and those required for the company's business dealings the following are necessary: Books.

1. A share certificate book, and if there is more than one class of shares then a book for each class.

2. A minute book or minute books. Minutes of directors' and shareholders' meetings are frequently kept in separate books.

3. A book or books to satisfy the requirements of s. 89.

4. The registrar of transfers required by s. 90.

The books in 3 and 4 above are open to the inspection of shareholders, creditors and their personal representatives, and of any judgment creditor of a shareholder, and accordingly it is important that the information therein required to be set out be kept separate from the minute books which are not open to such inspection.

It is to be noted that the alphabetical arrangement of the names of present and past shareholders required by sub-section (b) of section 90 can not be maintained unless a loose-leaf book is used. The combined "Stock Ledger and Register of Transfers" in common use offends against the above provision.

Secs. 7-10. Corporations without share capital (s. 7A).

Corporations without share capital.

Previously to the enactment of section 7A in 1917, corporations of the classes designated by the section were incorporated by private Act. This is no longer necessary. The section is limited to associations incorporated:—

(a) to carry on in more than one province of Canada

(b) without pecuniary gain

(c) objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like.

Incorporation is obtained by filing an application and memorandum of agreement in duplicate. The memorandum of agreement must set out the by-laws or regulations of the corporation which must cover the matters set out in sub-sections (2) (a) to (f). Such of the by-laws or regulations as the applicants desire may be embodied in the letters patent; in which case they can only be repealed or amended by supplementary letters patent. If not so embodied any variation or amendment of the by-laws requires the approval of the Secretary of State.

As the by-laws of a corporation governed by the section (unlike those of companies incorporated under s. 7) are either incorporated in the letters patent or are on file in the Department of the Secretary of State they are public documents and any person dealing with such corporations must satisfy himself in all cases that the provisions of the by-laws have been complied with; for the public will be deemed to have notice of the contents of such by-laws. Presumably the same applies to any amendments or variations of the original by-laws, though sub-section (4) of section 7A does not expressly provide that such amendments or variations must be filed.

See *Gold* v. *Maldaver* (1912), 4 O. W. N. 106.

The provisions of Part I. enumerated in sub-section (6) do not apply to corporations created under the section, so that they enjoy amongst others the following exemptions:

(1) There is no restriction on commencement of business (s. 26). Secs. 7-10.

(2) The word "Limited" is not required after the name of the corporation (ss. 33, 114, 115).

(3) No prospectus or statement in lieu of a prospectus is required to be filed (ss. 43-43D).

(4) Sections dealing with auditors do not apply, but provision for audit of accounts and appointment of auditors must be made in the by-laws (s. 7A (2) (*d*).

The tariff of fees applicable to corporations governed by s. 7A is given under s. 24.

The right of such corporations to acquire and hold land will in all cases be subject to the provisions of the provisional Act respecting Mortmain and charitable uses.

Shares without par value (s. 7B).

The Companies Act Amendment Act of 1917 adopted with slight modifications the provisions recently introduced in some of the states of the American Union for the creation of shares without nominal or par value. Such provisions appear in the corporation laws of New York, Delaware, Maryland and other states. Issue of shares without nominal or par value.

Among the advantages claimed for the innovation are that shares without par value purport to be what all shares really are, viz., participation certificates.

A share certificate for shares of no nominal or par value must have on its face the number of shares which it represents and the number of such shares which the company is authorized to issue.

It is not clear what, if any, transfer tax is payable on the transfer of such shares under provincial acts such as the Ontario Corporations Tax Act which imposes a transfer tax calculated on the par value of the shares transferred. This difficulty is met in the corresponding Delaware Act by providing that for the purposes of taxation the par value of such shares shall be deemed to be one hundred dollars.

It is further claimed that the above provisions enables shares to be sold at their actual market value

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when fresh capital is needed, when conditions are such that the company's shares could not be sold at par. The issue of such shares facilitates adjustment of rights in the case of reorganizations or amalgamations.

Companies to which the section applies are not subject to section 26 of the Act.

Presumably companies incorporated under s. 7 may, by appropriate proceedings under s. 34, obtain authorization to issue shares without par value.

The section does not appear to have been extensively made use of in Canada since its introduction; but in the United States on the other hand the tendency seems to be in favor of taking advantage of similar provisions in jurisdictions where they are in force. For a further discussion of such shares, see the article by V. Morawetz in (1912-3) 26 Harvard Law Review at p. 729.

Note on the nature and characteristics of joint stock companies generally and on certain incidents and advantages of incorporation.

Nature of company generally.

A company is a legal entity in contemplation of law only and not physically. Its existence is separate and distinct from and in addition to that of the persons who at any one time constitute all the members of the corporation. This is a characteristic which cannot be too strongly emphasized, and the distinction between the personality of the corporate body and that of its individual members whether regarded singly or in the aggregate must necessarily be borne in mind when considering the powers, rights and liabilities of a company.

As illustrating this distinction it may be noted that a shareholder's interest is merely a right to a share of the profits of the company and is not an interest in the real or personal property of the company: *Bank of Hindustan* v. *Allison* (1870) L. R. 6 C. P. 54, at p. 73; he has individually no seisin legal or equitable in the property of the company: *Acland* v. *Lewis* (1860) 30 L. J. C. P. 29, but the title is in the corporate body, per Maule, J., *Baxter* v. *Brown* (1845) 7 M. & G. 198, at p. 210, and "an incorporated company's assets are its

property and not the property of the shareholders for the time being," per Lindley, L.J., *Re Newman & Co.* (1895) 1 Ch. 674, at p. 685. Secs. 7-10.

A member of a company may contract with a company as if he were a stranger: *Dunston* v. *Imperial*, etc. (1832) 3 B. & Ad. 125, p. 132; per Lindley, L.J., in *Farrar* v. *Farrars* (1888) 40 Ch. D. 395, at p. 409; a creditor of a corporation is not a creditor of any one or more of the shareholders, his debtor being "that impalpable thing the corporation," per Jessel, M.R., *Flitcroft's Case* (1882) 21 Ch. D. 519, at p. 533, and in no legal sense are the individual shareholders the owners of the company's property, per Denman, C.J., *Reg.* v. *Arnaud* (1846) 9 Q. B. 806, at p. 817.

This distinction just pointed out will also serve to mark the difference between an incorporated company and a partnership. In some respects the rights and liabilities of members of each are similar, but a company and a partnership are essentially different in their nature. A partnership cannot be said to have a personality distinct from that of its members, and its powers, if limited at all, are only limited by the contract of partnership and, viewed from the standpoint of strangers dealing with the partnership, are determined largely upon the law of principal and agent.

There are many different classes into which corporations may be divided according as their nature, purpose or manner of creation is regarded. Classes of corporations.

One classification which bears directly on the subject in hand is that of Common Law Corporations and Statutory Corporations. The difference between these two classes is clearly shown by Bowen, L.J., in the case of *Baroness Wenlock* v. *River Dee Co.* (1887) 36 Ch. D. 674, note at p. 685. He says "At common law a corporation created by King's charter has *prima facie* . . . the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to." And see Blackstone, Vol. 1, p. 415 (4th ed., 1770). "When you come to corporations created by statute,

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the question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law." . . . "It creates a statutory corporation. . . . What you have to do is to find out what this statutory creature is . . . You must look at the statute only . . . It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look at the statute."

It was formerly considered that companies incorporated under Part I. were statutory corporations, but since the recent decisions referred to under 'Powers' in the notes to section 29, it is now determined that such companies are not statutory companies, and that the doctrine *ultra vires* does not apply to them.

A further illustration of the nature and characteristics of companies is derived from their classification into

Public (a) Public Companies fulfilling some public function such as Municipal Corporations.

Quasi-public (b) Quasi-Public Companies established primarily for their own emolument, though in some respects the public are largely interested in the due exercise of their rights and powers. Examples of this class are railway, canal, road, gas and waterworks companies.

Private. (c) Private companies having for their primary object the making of profit for their members in the pursuit of various commercial enterprises in which the public are not at all directly interested. It is largely to this class of companies that this book relates.

If incorporated by special Act the company's powers, its liabilities, the rights of its shareholders are determined by the special Act of incorporation: *Attorney-General* v. *Great Northern Ry. Co.* (1860) 1 De & Sin. 154 and by certain general provisions applicable to all such companies where these are not inconsistent with the provisions of the Special Act.

These general provisions which govern companies incorporated by Special Act of Parliament or of the Legislature are embodied in some provinces in Separate enactments known as the Companies Clauses Acts. In the other provinces the usual method is either to insert in the Special Act of Incorporation all the requisite provisions or to incorporate by reference to the Companies Act certain of its provisions, but unless these are specially so incorporated they do not apply. Secs. 7-10

Joint stock companies as distinguished from other corporations.

Joint stock companies are associations who contribute to a common fund which is called the capital of the company. This is divided into equal portions called stock or shares, in proportion to his holding of which each member of the company shares in the profit or loss resulting from the employment of the capital in the enterprise which the company is created to engage in; a holder of stock or shares may transfer his interest to another under certain prescribed conditions and in a specified manner, thereby causing himself to cease to be, and his transferee to become, a member of the company. It is this feature of the division of the capital into equal shares and the ownership of such shares being had by the various members of the corporation that gives it its distinctive name of "Joint Stock Company." Advantages of joint stock companies. 1. Division of capital.

2. Again, a general characteristic of joint stock companies is the privilege of limited liability conferred by such incorporation. The privilege of limited liability affords one of the greatest inducements to the formation of such companies. In this respect companies so incorporated possess a great advantage over individuals and over partnerships. According to the general law a person who goes into business either on his own account or as partner in a firm is liable for all the debts incurred by the business to the full extent of his means. As was said by Lord Justice James in one case: 2. Limited liability.

Secs. 7-10.

" As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business or which he represents as partnership business, and not being in its nature beyond the scope of the partnership. A partner who may not have a farthing of capital left may take moneys or assets of the partnership to the value of millions, may bind the partnership by contracts to any amount, and may even, as has been shown in many painful instances in this court, involve his innocent partners in unlimited amounts for frauds which he has craftily concealed from them."

Limited liability.

As distinguished from this condition of affairs the shareholders in a joint stock company with limited liability risk only the amount of the capital for which they subscribe and are not liable for debts of the company beyond that amount. It follows from this position that joint stock companies afford superior " sleeping-partnership " facilities. In case of a partnership a sleeping partner takes no part in the management and is not ostensibly a partner, yet he incurs the same liability as the ordinary partner and his whole fortune is liable to pay the debts of the partnership. If, however, the business is worked as an incorporated company, the sleeping partner can have as large an interest as he likes without incurring any liability beyond the shares for which he subscribes, and moreover, there is no need for his name to appear in the list of shareholders or elsewhere in connection with the company. His shares can be placed in the name of a trustee or nominee or in the name of several. This is in many cases a matter of great importance for it frequently happens that prominent business men, while willing to subscribe to an undertaking, make it a condition that their name shall not appear.

3. Borrowing facilities.

3. Another characteristic incident of joint stock companies is the superior borrowing facilities which they possess by the issue of bonds, debenture stock or other securities.

4. Other advantages possessed by these companies consist in the facilities offered by corporate existence for effecting combinations and amalgamations either by way of co-operation, reciprocal concessions or other arrangements. 4. Combinations.

5. Further, a very valuable feature in the formation of joint stock companies is that persons trading as a company can by that means effectually restrict the powers of the acting partners, that is of the directors. In the case of a partnership every partner is the unlimited agent of the partnership to do every kind of business for it and to bind it by every sort of contract, but the directors of the company are in a very different position. They are special agents and have only such powers as are given to them by the by-laws of the company and by the Act under which they are incorporated. 5. Powers of directors.

6. Many advantages also result from the distinct and separate existence of the company independent of the shareholders who from time to time compose it. The death of a shareholder does not interfere with the continued existence of the company as it does in the case of a partnership nor does the bankruptcy of a shareholder nor his lunacy. In the case of a partnership every change of the firm necessitates the drawing of new conveyances, which of course becomes unnecessary where the change is merely a transfer of shares in the company. This is only one feature illustrating the facility with which new members may be introduced and others who desire to realize upon their assets may retire from companies. 6. Transmissibility of shares.

7. The shares and stocks in such a company also afford in many instances an asset of commercial value which can be used with great advantage in any other enterprise in which the owner is engaged. 7. Shares.

11. The letters patent shall recite such of the established averments in the application and memorandum of agreement as to the Secretary of State seems expedient. 2 E. VII., c. 15, s. 8. Averments to be recited.

Sect. 12.

Name of company.

12. The Secretary of State may give to the company a corporate name, different from that proposed by the applicants if the proposed name is objectionable. 2 E. VII., c. 15, s. 9.

See the notes under section 21.

Notice to be published.

13. Notice of the granting of the letters patent shall be forthwith given by the Secretary of State of Canada by one insertion in the *Canada Gazette,* in the form C in the Schedule to this Act; and thereupon, from the date of the letters patent, the persons therein named, and such persons as have become subscribers to the memorandum of agreement or who thereafter become shareholders in the company, and their successors, shall be a body corporate and politic, by the name mentioned in the letters patent. 7-8 Geo. V. c. 25, s. 5.

As to shareholders, see the note to ss. 38 ff.

As to Existing Companies.

Existing companies may be incorporated.

14. Any company heretofore incorporated for any purpose or object for which letters patent may be issued under this Part, whether under a special or a general Act, and now being a subsisting and valid corporation, may apply for letters patent to carry on its business under this Part, and the Secretary of State, with the approval of the Governor in Council, may direct the issue of letters patent incorporating the shareholders of the said company as a company under this Part.

Effect of letters patent

2. Upon the issuing of such letters patent all the rights, property and obligations of the former company shall be and become transferred to the new company, and all proceedings may be continued or commenced by or against the new company that might have been continued or commenced by or against the old company.

Names of shareholders.

3. It shall not be necessary in any such letters patent to set out the names of the shareholders.

Effect of letters patent.

4. After the issue of such letters patent the company shall be governed in all respects by the provisions of this Part, except that the liability of the shareholders to creditors of the old company shall remain as at the time of the issue of the letters patent. 2 E. VII., c. 15, s. 11.

Scope of letters patent

15. If a subsisting company applies for the issue of letters patent under this Part, the Secretary of State may, by the letters patent, extend the powers of the company to such other objects for which letters patent may be issued under this Part as the applicant desires, and as the Secretary of State thinks fit to include in the letters patent. 2 E. VII., c. 15, s. 12.

First directors.

16. The Secretary of State may in any letters patent issued under this Part to any subsisting company name the first directors of the new company, and the letters patent may be issued to the new company by the name of the old company or by another name. 2 E. VII., c. 15, s. 12.

Sect. 17.

Existing companies incorporated by Act may be incorporated under this Part.

17. Any company incorporated under any general or special Act of any of the provinces of Canada, and any company duly incorporated under the laws of the United Kingdom or of any foreign country for any of the purposes or objects for which letters patent may be issued under this Part, and being at the time of the application a subsisting and valid corporation, may apply for letters patent under this Part, and the Secretary of State, upon receiving satisfactory evidence that the Act of incorporation or charter of the company so applying is valid and subsisting and that no public or private interest will be prejudiced, may issue letters patent incorporating the shareholders of the company so applying as a company under this Part, limiting, if necessary, the powers of the company to such purposes or objects as might have been granted had the shareholders applied in the first instance to the Secretary of State for letters patent under this Part, and thereupon all the rights, property and obligations of the former company shall be and become transferred to the new company, and all proceedings may be continued or commenced by or against the new company that might have been continued or commenced by or against the old company.

Proceedings continued.

Name of shareholders.

2. It shall not be necessary in any such letters patent to set out the names of the shareholders.

Effect of letters patent.

3. After the issue of such letters patent the company shall be governed in all respects by the provisions of this Part, except that the liability of the shareholders to creditors of the old company shall remain as at the time of the issue of the letters patent. 2 E. VII., c. 15, s. 13.

Proceedings for incorporation of chartered companies.

18. Every company desirous of obtaining letters patent under the last preceding section shall first file in the office of the Secretary of State of Canada a certified copy of the charter or Act incorporating the company, and shall also designate the place in Canada where its principal office will be situated and the name of the agent or manager in Canada authorized to represent the company and to accept process in all suits and proceedings against the company for any liabilities incurred by the company therein. 2 E. VII., c. 15, s. 13.

Return to Minister.

19. Every such company to which such letters patent have been granted, when so required, shall make a return to the Secretary of State of the names of its shareholders, the amount of its paid-up capital and the value of its real and personal estate held in Canada, and, in default of making the said return within three months, the letters patent may be cancelled. 2 E. VII., c. 15, s. 13.

Publication of notice.

20. Notice of the issue of such letters patent shall be published in the *Canada Gazette*. 2 E. VII., c. 15, s. 13.

Secs. 14-20.

The above sections provide machinery whereby existing companies may be brought under the provisions of this act. As regards companies incorporated under provincial charters it is to be noted that section 17 does not purport to authorize the Secretary of State to grant rights and powers to existing companies which enlarge their existence and capacity, which would be *ultra vires, Bonanza Creek Gold Mining Co.* v. *The King* (1916) 1 A. C. 566; *Atts.-Gen. for Ontario, &c.* v. *Att.-Gen. for Canada* (1916) 1 A. C. 598. What apparently is contemplated is the incorporation of a new company under a Dominion charter, to which new company are transferred the rights and obligations of the old company. For an example of a provincial company brought under the jurisdiction of the Dominion, see *Novell* v. *Canada Southern Ry.* (1883-4) 9 A. R. 310. In practice these sections are never made use of. If it is desired to turn a provincial company into a Dominion company the most convenient method is to incorporate a new Dominion company to which the assets of the provincial company may be sold. The provincial company is then wound up and its shareholders receive shares in the new company. Where a foreign company, *e.g.,* an American company desires to carry on its operations throughout the Dominion of Canada under a Dominion charter the practice is to have a subsidiary company with a small capitalization incorporated under the Dominion Act, which has for its officers and directors nominees of the parent company, the corporate existence of which is not affected.

Where a provincial company was re-incorporated under a private Act of the Dominion Parliament it was held on the construction of the Act that the shareholders of the old company did not become shareholders of the new company in the absence of allotment to them of shares in the latter: *Re Dominion Trust Co. and Allen* (1917) 37 D. L. R. 251.

Change of Name.

Minister may change name by supplementary letters.

21. If it is made to appear to the satisfaction of the Secretary of State that the name of a company, given by original or supplementary letters patent issued under this Part, is the same as the name af an existing incorporated or unincorporated com-

pany, or so similar thereto as to be liable to be confounded therewith, the Secretary of State may direct the issue of supplementary letters patent, reciting the former letters and changing the name of the company to some other name which shall be set forth in the supplementary letters patent. 2 E. VII., c. 15, s. 14. Sect. 21.

22. When a company is desirous of adopting another name, the Secretary of State, upon being satisfied that the change desired is not for any improper purpose, may direct the issue of supplementary letters patent, reciting the former letters patent and changing the name of the company to some other name, which shall be set forth in the supplementary letters latent. 2 E. VII., c. 15, s. 15. Company may obtain change of name.

23. No alteration of name under the two sections last preceding shall affect the rights or obligations of the company; and all proceedings may be continued or commenced by or against the company under its new name that might have been continued or commenced by or against the company under its former name. 2 E. VII., c. 15, s. 16. Change not to affect rights or obligations.

The name of the company is also referred to in the following sections of the Act:—

7 (1) (*a*) (Application to set out proposed name which must be unobjectionable); s. 12 (The Minister may give a name different from that proposed if objectionable); s. 16 (where existing company is re-incorporated name of old company or a new name may be given); s. 33 (name followed by word "limited" must be used in certain cases and affixed outside of chief office); s. 100 (mention of name in legal proceedings sufficient without setting forth mode of incorporation); s. 114 (penalty for neglect to keep printed or affixed name of company and word "limited"); s. 115 (penalty for failure to keep name of company followed by word "limited" on seal, notice, bill or note, bill of parcels, invoice or receipt).

The name of a company must be free from objection and the petition for incorporation should state that the proposed name is not that of any other existing company or partnership. The consent of the Minister to the adoption of the name selected may also be withheld on the ground that the words "Royal," "Imperial," "Empire," etc., are included, if the effect To be free from objection.

Secs. 21-23.

of such inclusion is to indicate that the company is connected with the Government. This point is covered by dispatches from the Colonial Office dated 8th December, 1899, 27th May, 1908, and 19th February, 1909. Likewise the addition of "Canadian" and "Dominion" would be objectionable on the same grounds.

It is sufficiently clear from what has been said above that it is highly desirable to make enquiry at the office of the Secretary of State whether the proposed name will be allowed, and it will be found to be a convenient practice to do this before the documents leading to incorporation are executed. If the Secretary of State finds the proposed name objectionable Section 12 of the Act authorizes him to give the company a different name from the one asked for.

There is nothing to prevent an existing company from opposing before the Secretary of State the incorporation of a new company with an objectionable name before the letters patent are issued. This was done in the case of the application for the incorporation of a company with the name "Linde Canadian Refrigeration Company, Limited." The name was objected to on the ground of similarity with the name "The Linde British Refrigeration Company, Limited." The objection was not upheld, the name not being deemed sufficiently similar to deceive. After incorporation the company's name may be changed:

Change after incorporation.

(a) By the Secretary of State.

(b) At the instance of the company.

(c) At the instance of persons prejudicially affected.

The incorporation of a company with a certain name does not of itself entitle the company to use that name if objection is subsequently made. Section 21 of the Act provides machinery by which after incorporation objection can be made to the corporate name before the Secretary of State on the ground of its being so similar to that of some existing incorporated or unincorporated company as to lead to confusion.

For the meaning of the term "unincorporated company" see *In Re Russell Literary and Scientific Asso-*

ciation; Figgins v. *Baghino* (1898) 2 Ch. 72; *In Re Jones; Clegg* v. *Ellison* (1898) 2 Ch. 83. Secs. 21-23.

The topic may conveniently be discussed under the following headings:—

(1) By whom objection may be made.

(2) What companies are subject to this section.

(3) Forum and procedure.

(4) The grounds on which objection will be sustained.

Who may object.

Dealing with these in order, as to (1) the objection must be made on behalf of an existing incorporated or unincorporated company. An individual, and doubtless a partnership, or a group of individuals not falling within the definitions of an unincorporated company have no *locus standi* under this section whatever their rights may be at common law, cf. *Canadian National Investors, Limited* v. *Canadian National Estates* (1911-12) 1 W. W. R. 87. The company seeking to protect its right to its name need not be a Dominion company. It has been held in England that a foreign trader who has no local agency but whose goods are marketed in England is entitled to restrain a piracy of his trade name: *Panhard et Levassor* v. *Panhard Levassor Motor Co., Limited* (1901) 2 Ch. 513.

Application of section.

(2) The Act applies only to companies incorporated under it and the provisions of Section 21 cannot be relied on where the company whose name is objected to is not a Dominion company. The objection to similarity of names does not apply where a company is about to be wound up and the new company shows that the company whose name is to be used consents to such use.

Forum and procedure.

(3) The forum provided by this section is the Secretary of State. No special procedure is indicated and in practice complaint is usually made by letters to the Department at Ottawa, which communicates the objection to the delinquent company. If the facts are clear and no answer is made to the objection the Secretary of State acts thereon without further formality. If the facts are disputed an opportunity is given for a hearing before the Minister. The question so determined by him would doubtless be *res judicata* as between the

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parties, but probably not as to others. The opinion of the registrar as to similarity is not conclusive on the Court under the Investment and Loan Societies Act, Statutes of British Columbia, 1898, c. 7, s. 2, *B. C. Permanent* v. *Wooton* (1899) 6 B. C. R. 382.

The question arises whether an objection to the name of a Dominion company is a matter for the Secretary of State alone to deal with so that the jurisdiction of the courts is excluded, on the principle that letters patent having been granted by the Crown conferring a particular name on a company such name is an irrevocable franchise, the enjoyment of which is not open to question in the courts: *Travellers* v. *Travellers* (1911) 20 Que. K. B. 437. In England the procedure is to apply to the Court for an injunction and in practice this is the course pursued in Canada. See *Canadian National Investors, Limited* v. *Canadian National Estates* (1911-12) 1 W. W. R. 87, where the registrar had permitted the registration of a company with a name so similar to that of a company previously incorporated as to be calculated to deceive, and the company subsequently incorporated was restrained from carrying on such business. As the provisions of the British Columbia Companies Act (1910) c. 7, s. 18 (1) (2) under which the above case was decided were somewhat different from those of this section, the case does not dispose of the question. See also *John Palmer Co.* v. *Palmer-McLellan Shoe-Pack Co.* (1917) 37 D. L. R. 201, 228.

Grounds of objection.

(4) The grounds on which an objection will be sustained are clearly defined in the numerous English cases on the subject.

Doubtless the Minister in dealing with any specific case would be guided by these principles and they are of course applicable where a remedy is sought in the Courts. The Secretary of State has held that the names "Linde Canadian Refrigeration Company, Limited," and "Linde British Refrigeration Company, Limited" were not so similar as to deceive. On the other hand where a company called "British Canadian Canners, Limited," was using in its trade mark "Canadian Canners," the Secretary of State granted

the application of the Dominion Canners, Limited, for the changing of the name of the former company. In doing so the Minister relied on English cases cited in the argument. Secs. 21-23.

The principle on which the courts will act to restrain the use of a name is the same as that which protects persons in the use of trade marks, *i.e.*, one trader is not permitted to represent his undertaking or his goods to be the undertaking or goods of his competitor: *Boston Rubber Co.* v. *Boston Rubber Co. of Montreal* (1902) 32 S. C. R. 315; *Sovereen Mill, &c., Co.* v. *Simcoe Mill, &c., Co.* (1904) 3 O. W. R. 681. Fraud need not be shown: *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (1899) A. C. 83. Similarity of business as well as similarity of name and the fact that both businesses are carried on in the same locality is an important feature. *Merchant Banking Company of London* v. *The Merchants Joint Stock Bank* (1878) 9 Ch. D. 560.

In addition to similarity of name there must be likelihood of confusion, and it is usually necessary to show that such confusion has arisen to the damage of the plaintiff company. See *Laing Packing and Provisions Co.* v. *Laing* (1904) Q. R. 25 S. C. 344, followed in *Lamontagne* v. *Girard* (1911), Q. R. 39 S. C. 179.

See also *General Reversionary Investment* v. *General Reversionary Co.* (1898) 1 Megone 65. In *Canada Permanent* v. *British Columbia Permanent* (1899) 6 B. C. R. 377 "British Columbia Loan and Savings Co." was held not to be so similar to "Canada Permanent Loan and Savings Co." as to be calculated to deceive the public.

In some cases the right to use an existing trade name may be acquired, as for example where the good will of an existing business is purchased: *Canada Paint* v. *William Johnson & Sons* (1893) Q. R. 4 S. C. 253. See *Montreal Lithographing Co.* v. *Sabiston* (1899) A. C. 610, at p. 613, also *Kingston Miller* v. *Thomas Kingston & Co.* (1912) 1 Ch. 575, at p. 581, and *Rose* v. *McLean Publishing Co.* (1897) 24 A. R. 240; *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal* (1902) 32 S. C. R. 315; *Re Elkington & Co.* (1908) 11 Can. Ex. Ct.

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Rep. 293; *Standard Ideal* v. *Standard Mfg. Co.* (1911) A. C. 78.

Where a particular name has been given to a Dominion company, an interim injunction was granted to restrain a provincial company subsequently incorporated from operating under the same name: *Semi Ready* v. *Semi Ready* (1910) 15 B. C. R. 301.

In *Travellers* v. *Travellers* (1911) 20 K. B. Que. 437, the plaintiff company, an American corporation, brought an action to restrain the defendant from continuing to use the name under which it had been incorporated on the ground that it was calculated to deceive and did in fact deceive the public. The defendant company had been incorporated by special act of the Dominion Parliament. It was held that as the Dominion Parliament had conferred the name upon the company it was not open to the courts to interfere with the use of such name as such interference would amount to a denial of the right of the Dominion company to existence and the exercise of the rights and powers conferred on it by Parliament. Lavergne, J., delivering the judgment of the Court, pointed out at p. 441 that the case was one of a company incorporated by Act of Parliament, not by letters patent. *Quære,* whether the same rules would apply in the latter case, and see the dissenting judgment of Cross, J. The use of the name given to a company by the letters patent will not be restrained because it resembles in part the name of another company whose incorporation is earlier in date: *John Palmer Co.* v. *Palmer McLellan Shoe Pack Co.* (1917) 37 D. L. R. 201.

See further on the question of the right to exclusive use of the corporate name the following cases: *Croft* v. *Day* (1845) 7 Beav. 84; *Hendriks* v. *Montagu* (1881) 17 Ch. D. 638; *Colonial Life* v. *Home and Colonial* (1864) 33 Beav. 548; *Tussaud* v. *Tussaud* (1890) 44 Ch. D. 678; *Saunders* v. *Sun Life* [1894] 1 Ch. 537; *North Cheshire* v. *Manchester* [1899] A. C. 83.

Fees and Forms.

Tariff by Governor in Council.

24. The Governor in Council may establish, alter and regulate the tariff of fees to be paid on application for any letters

patent or supplementary letters patent under this Part, on filing any document, on any certificate issued under this Act, on making any return under this Act and on the making of any search of the files of the Department of the Secretary of State of Canada respecting a company. The amount of any fee may be varied according to the nature of the company, the amount of the capital stock, or other particulars, as the Governor in Council deems fit. 7-8 Geo. V. c. 25, s. 6. Sect. 24.

2. No steps shall be taken in the Department of the Secretary of State towards the issue of any letters patent or supplementary letters patent under this Part, until after all fees therefor are duly paid. 2 E. VII., c. 15, ss. 13 and 17. Must be paid before letters issued.

The following tariff of fees, under the provisions of Section 24 of the Companies Act, as amended by Section 6 of the Companies Act Amendment Act, 1917, has been established by Order-in-Council, P.C. 14, of January 12, 1918:

Letters Patent and Supplementary Letters Patent.

When the proposed capital of the company is $50,000 or less	$ 100.00
When the proposed capital is more than $50,000 and not more than $200,000.....	100.00
and $1.00 for each $1,000 or fractional part thereof in excess of $50,000.	
When the proposed capital is more than $200,000, and not more than $500,000	250.00
and fifty cents for each $1,000 or fractional part thereof in excess of $200,000.	
When the proposed capital is more than $500,000	400.00
and twenty cents for every additional $1,000 or fractional part thereof.	
For letters patent to any company under Sec. 7A added to the Companies Act by Sec. 4 of the Companies Act Amendment Act, 1917 (other than a company incorporated for charitable purposes only)	100.00
For letters patent to any company incorporated for charitable purposes only (other than a war charity when there shall be no fee)	25.00

Sect. 24.

For letters patent to a company under Sec. 7B added to the Companies Act by Sec. 4 of the Companies Act Amendment Act, 1917, when no amount at which shares may be sold is set out in the letters patent, then the amount of each share shall be fixed at $100.00 and the fee payable shall be according to the foregoing tariff upon the capital stock calculated on the total amount of such shares either at the price set forth in the letters patent or at the fixed sum of $100.00 as the case may be.

For supplementary letters patent increasing the capital of a company, the fee to be according to the foregoing tariff but on the increase only, that is, the fee to be the same as for the incorporation of a company with capital equal to the increase.

For supplementary letters patent changing the name of a company $50.00

For supplementary letters patent for other purposes 100.00

The tariff of fees under the provisions of Sec. 272 of The Companies Act for licenses to foreign companies to mine, shall be the same as for the incorporation of companies with the same authorized capital.

For Filing Returns.

For filing returns under Section 106 of The Companies Act as amended by Section 13 of The Companies Act Amendment Act, 1917, the fee payable upon each return shall be as follows:—

When the capital stock of the company is $200,000 or less ..... $ 5.00

When the capital stock of the company is more than $200,000 but not more than $500,000. 10.00

When the capital stock of the company is more than $500,000 but not more than $1,000,000 ..... 25.00

When the capital stock is more than $1,000,000 and $1.00 on each $1,000,000 in excess of the first million but not exceeding $50.00 in all.	$25.00	Sect. 24.
For filing return from a company having shares without nominal or par value the fee payable shall be calculated upon the capitalization of such company shown in such return.		
For filing return from a company incorporated for charitable purposes (other than a war charity when there shall be no fee)	1.00	
For filing return from any company incorporated under sec. 7A, added to the Companies Act by Sec. 4 of the Companies Act Amendment Act, 1917 (other than a company incorporated for charitable purposes only)	2.00	

Certificates of Registration, Etc.

For each certificate of registration or deposit of any prospectus, notice or agreement or other such document filed for that purpose under the provisions of the Companies Act or the Companies Act Amendment Act, 1917	$ 1.50

25. The Governor in Council may prescribe the forms of proceedings and registration in respect to letters patent and supplementary letters patent issued under this Part, and in respect to all other matters requisite for carrying out the objects of this Part. 2 E. VII., c. 15, s. 17. Forms to be prescribed by Governor in Council.

The only forms of which the writers are aware which have been prescribed by order-in-council are the forms of return under s. 106 and forms of certificates to be given by the Department under s. 69A.

Commencement of Business.

26. The company shall not commence its operations or incur any liability before ten per centum of its authorized capital has been subscribed and paid for. 2 E. VII., c. 15, s. 18. Ten per cent. of capital to be paid.

Sect. 26.

This section does not apply to companies with shares of no par value.

The effect of the corresponding section in the Manitoba Joint Stock Companies Act, R. S. M. (1902) c. 30, s. 22, was considered in *Muldowan* v. *German Canadian Land Co.* (1909) 19 Man. L. R. 667. That section was identical with s. 26 and the Manitoba Act only differed in that unlike the Dominion Act it imposed no penalty on the directors of the company for a violation of its provisions. The requirement was held to be directory and not mandatory so far as it concerned dealings with strangers unaware that it had not been complied with. Cameron, J., at p. 674, in considering this section of the Dominion Act, referred to section 86 which imposes a penalty on every director authorizing the incurring of liability by the company before 10 per cent. of the capital has been subscribed and paid for. He observed, "obviously under this act a contract entered into before the commencement of operations is authorized, is not nullified. The directors are made severally liable with the company upon it."

It was furthermore held that the objection that the section had not been complied with could have been taken by the Crown alone. As to forfeiture of charter by the Crown, see note to s. 27. Apparently a shareholder could not restrain the company from commencing business on the ground of non-compliance with the section.

As to the rules applicable for the interpretation of a statute where its prescriptions relate to the performance of a public duty, see Maxwell on Statutes, ed. 5, p. 608.

In the *Muldowan Case, Pierce* v. *Jersey Waterworks,* L. R. 5 Ex. 209, was distinguished and the doctrine of Lord Hatherly in *Mahony* v. *East Holyford* (1875) L. R. 7 H. L. 809, at p. 894 relied on. "No person dealing with them (the persons conducting the affairs of the company) has a right to suppose that has been done or can be done that is not permitted by the Articles of Association of the Company." Cameron, J., at pp. 675-676, said "Parties dealing with the company

may presume that its internal management is regular: *Royal British Bank* v. *Turquand*, 6 E. & B. 327. The authorities and the reasoning applicable to a *de facto* agent or officer of a corporation are, to my mind, equally applicable to the stock subscription and payment required by Section 22." Sect. 26.

See also *French Gas Saving Company* v. *Desbarats Advertising Agency* (1912) 1 D. L. R. 136, where the directors of the company were held jointly and severally liable with the company for the payment of liabilities arising from the commencement of business before 10 per cent. of the authorized capital had been subscribed and paid for under the provisions similar to this section of the Dominion Act contained in R. S. Q. (1909) Art. 6019.

There is nothing in the Act requiring payment for ten per cent. of the authorized capital to be made in cash, and doubtless any consideration which would support a plea of payment would be sufficient; see *Larocque* v. *Beauchemin* (1897) A. C. 358.

The restriction contained in s. 87 of the Companies (Consolidation) Act, 1908, on the commencement of business is of a different nature to that contained in this section. Under the Imperial Act the fact that the company is entitled to commence business is evidenced by certificate given by the Registrar of Companies and the section expressly provides that any contract made by a company before the date at which it is entitled to commence business shall be provisional only. Accordingly cases decided under s. 87 of the Imperial Act are not applicable to this section.

That a company regularly formed began business before it was legally entitled to do so is no answer to a claim to put a shareholder on the list of contributories: *Re Western Canadian Fire Insurance Company; Craig's Case* (1914) 19 D. L. R. 170. Nor did the fact that a bank, incorporated by private Act pursuant to the Bank Act R. S. C. (1906) c. 29, never reached the stage where it would become entitled to obtain a certificate to commence business, prevent the provisional directors from allotting shares to subscribers: *Re Monarch Bank of Canada* (1914) 32 O. L. R. 207.

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Forfeiture of charter for non-user.

27. In case of non-user by the company of its charter for three consecutive years or in case the company does not go into actual operation within three years after the charter is granted, such charter shall be and become forfeited. 2 E. VII., c. 15, s. 19.

Forfeiture of charters generally.

Where the Crown is imposed on by a false suggestion, or where a grant has been made by mistake or in ignorance of some material fact, or it has granted anything which by law it cannot, it may, by its prerogative, repeal its own grant. And where by several letters patent the self-same thing has been granted to several persons, the first patentee is permitted in the meantime at the suit of the Crown to repeal the subsequent letters patent. And in every case of a patent so granted which is injurious to another, the injured party is permitted to use the name of the Crown in a suit by *scire facias* for the repeal of the grant: 2 Wms. Saund. 72.

And in cases where the charter of a company is declared by its governing statute to be forfeited on the happening of a certain event, as in s. 27, *scire facias* is a proper proceeding to take to have the charter annulled. It would seem clear by the use of apt words the legislature might so limit the existence of a company that it would expire and terminate on the happening of a given event without more. Yet, where the Act simply declares that the charter shall be "forfeited," or there is a condition on the fulfilment of which the corporate powers depend, it is settled that a substantive judicial proceeding is necessary to terminate the existence of the company.

Brice says of the forfeiture of charters: "The power of the Crown or the State to cancel a charter or withdraw its permission from a corporation when given in another form, for non-observance of conditions, remains in full vigour, and it may be exercised at any moment for the punishment of an offender. Consequently, where a corporation or its officers are acting contrary to the provisions of their charter, or other constating instruments, or in any other manner so as to imperil the existence of the corporation, the Courts

will, upon the request of any member, restrain such acts." 3rd ed., p. 779. Sect. 27.

In Ontario it is not necessary to resort to the courts, power to forfeit being conferred on the Lieutenant-Governor-in-Council.

Forfeiture as a ground of defence

It may be regarded as an accepted principle that the question whether a corporation has forfeited its franchise and ceased to exist cannot in general be raised in a collateral proceeding, but can only be raised by the State whose privilege alone it is to question the right of the corporators to exercise franchises which they do exercise. So that in the absence of a statute otherwise providing, so long as the State does not interfere, a rightful existence of the corporation will be presumed for the purposes of any collateral proceeding. Thompson, par. 6598.

But it has been held in Quebec that if the company has become completely disorganized and has neither president nor directors it may be alleged by way of defence: *La Companie du Cap Gibralter* v. *Lalonde*, M. L. R. 5 S. C. 127; *Misawippi Valley Ry. Co.* v. *Walker* (1871) 3 R. L. 450. And it has also been held in Quebec that when a company had forfeited its charter by breach of its act of its incorporation, a defendant may have an action against him by the company stayed until proceedings can be taken to have the charter annulled: *Windsor Hotel* v. *Murray*, 1 L. N. 75. See also *Quebec and Richmond Ry. Co.* v. *Dawson* (1851) 1 L. C. R. 366.

American cases.

The American authorities hold that, in an action against him, a defendant cannot adduce evidence short of showing that the company has been wound up or dissolved, and this rule applies to actions for calls: *Connecticut, etc., R. Co.* v. *Bailey*, 24 Vt. 465; *Buffalo, etc., Ry. Co.* v. *Cary*, 26 N. Y. 75, and that the company must be regarded as having a legal existence until a judgment of forfeiture has been had in a direct proceeding: *Bohammon* v. *Binns*, 31 Miss. 355.

When franchises are granted, however, upon the condition that they shall be exercised within a given

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time, or that within a given time the corporation will do a certain act, there has been difference of opinion in the different States as to whether failure to comply with the condition *ipso facto* works a forfeiture of the charter and terminates the existence of the company, or whether it simply permits of proceedings by the State to set aside the charter.

Judge Thompson is of the opinion that the correct doctrine is that when the statute creating the corporation declares that unless the corporation performs certain acts within a prescribed time its corporate existence and powers shall cease, or its powers and franchises terminate, the statute executes itself so that if the prescribed acts are not done within the prescribed time the corporation *ipso facto* ceases to exist without the necessity of any further act by the State, either by a legislative declaration of forfeiture, or by a judgment of forfeiture in a judicial proceeding. He is also of the opinion that in such a case the question is a question of fact which may be ascertained in every judicial proceeding whether the question arises directly or collaterally whenever its ascertainment becomes necessary for the protection of rights or the redress of wrongs.

In support of this view the writer quotes from a judgment of Chief Justice Marshall where he says: "It has been proved that in all forfeitures accruing at common law nothing vests in the Government until some legal steps shall be taken for the assertion of its right, after which for many purposes the doctrine of relation carries back the title to the commission of the offence. But the distinction taken by counsel for the United States between forfeitures at common law and those accruing under a statute is certainly a sound one. When a forfeiture is given by statute the rules of the common law may be dispensed with, and forfeiture may either operate immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend on the construction of the statute": *United States* v. *Grundy,* 3 Cranch (U.S.) 337, 351.

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The reason why a forfeiture created by a statute is self-executing while one passed by the common law is not, is that the legislature says so and intends so; and that it is competent for the legislator to change the rules of the common law, and that much of the work of legislators in fact consists in making such changes. Thompson, par. 6587.

Conditions precedent not complied with.

In the case of *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada* (1892) 21 S.C. R. 72, the act of incorporation of a Dominion company contained clauses which provided that when and so soon as $100,000 of the capital stock should have been subscribed and thirty per cent. thereof should have been paid in to some chartered bank to the credit of the company, such subscription and payment being made within six months after passing of the Act, the provisional directors might call a general meeting of shareholders at some place to be named, etc., and commence operations.

Only $60,500 was *bona fide* subscribed prior to commencing operations and action was brought in the name of the Attorney-General of Canada to set aside and forfeit the company's charter. The Supreme Court held that the *bona fide* subscription of $100.00 was a condition precedent to the legal organization of the company and that the Attorney-General was entitled to have the company's charter forfeited.

Taschereau, J., said (p. 84): "It seems to me plain that under this clause the company could not be organized and carry on any business unless $100,000 were subscribed within six months, and thirty per cent. thereon paid into some bank within the same time. That was a condition subsequent to the incorporation itself—it could not but be so—but it was a condition precedent to the organization of the company required for the protection of the company, and as such, imperative and not merely directory. The provisional directors having failed to get the $100,000 subscribed, and the thirty per cent. paid in within the six months, their powers had lapsed, the provisional incorporation was gone, the conditional charter

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was effete. Statutes creating corporations and granting them powers and privileges subject to certain regulations and conditions are to be construed strictly."

But non-compliance with a condition of this kind does not, *ipso facto*, extinguish the company nor revoke its charter. Extinction can only be procured by special suit by the Attorney-General: *R.* v. *Cie de Ch. de Fer.*, M. & O. 14 Q. L. R. 255.

In a Nova Scotia case where a company was incorporated by special act for constructing a line of railway, but never become legally organized, its stock not being subscribed or paid up according to the provisions of its charter, proceedings were commenced by the Attorney-General asking for an injunction to restrain the defendants from making use of the name or exercising the powers of the company on these grounds; and it was held that the public having an interest in the railway, and the attainment of the objects in view in connection with its construction, the Attorney-General had the right to maintain the action and to succeed to the extent to which the public interests were involved: *Attorney-General* v. *Bergen* (1896) 29 N. S. 135.

Condition subsequent.

R. S. O. (1887) c. 160, s. 54, provided that if a certain company did not complete its works within two years from date of incorporation it should forfeit all its corporate and other powers, and that they should thenceforth cease and determine unless further time was granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works.

The Supreme Court, when this provision came before them for consideration, considered that the non-completion of the work within two years would not *ipso facto* forfeit the charter, but only afford grounds for a proceeding by the Attorney-General to have a forfeiture declared.

Sir Henry Strong, C.J., said: "Now it will be observed that the provision shows in plain terms that forfeiture by lapse of time may be covered by an extension of time granted either by a public body, the county or district council of the adjoining municipality, acting

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of course in the public interest, or by a high and responsible officer of the Crown. This shows that a lapse of the corporate powers, provided for in the section quoted, was entirely in the interest of the Crown and public. Whatever effect might otherwise have been given to the words used, I cannot bring myself to think that more was intended than to authorize a proceeding by the Attorney-General, on behalf of the Crown, to have a forfeiture judicially declared, and that it was not competent to a private person indirectly to insist on the cesser of the corporate powers of the respondents under the circumstances stated. However, I do not insist upon this as a ground for upholding the judgments appealed against as the reasons already stated for holding the appellants precluded for taking the objection to the legal existence of the corporation are sufficient for the purpose. There are still further reasons for not assenting to the contention of the appellant on this head": *Hardy* v. *Pickerel River Co.* (1898) 29 S. C. R. 211.

Partial annulment.

The Privy Council have held that a partial annulment of letters patent cannot be had in a *scire facias* proceeding, as by such a partial annulment a corporation might be created quite contrary to the intention of the Crown. It must be annulled altogether and as to all the members. They said that the facts there found showed that the grant of letters patent and the recitals therein were obtained by means or false and fraudulent statements, and quite sufficient to warrant a total annulment of the letters patent: *La Banque d' Hochelaga* v. *Murray* (1890) 15 App. Cas. 414.

Effect of forfeiture.

Forfeiture of the charter of a company destroys its power to make contracts, or to sue and be sued, and abates all pending actions, by or against it. Thompson, par. 6719.

It was a principle of the common law that, on the dissolution of a corporation, its real property acquired, by gift or grant, for corporate purposes, reverted to the donor or grantor or his heirs. Goods and chattels, however, were regarded as *bona vacantia* and vested in the sovereign. 1 Co. Inst. 13*b*; 1 Roll. Abr. 816.

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This obtains in modern law, but the assets are charged with the payment of the corporate obligations. Thompson, par. 6730.

Procedure.

The method of procedure is by a writ of *scire facias* against the corporation to repeal the charter, or against a body claiming to exercise corporate powers to determine the validity of such claims; and by *quo warranto,* either when the intention is to inflict the minor punishment of suspending for a while the corporate franchises, and not of actually taking them away and determining the existence of the corporation; or when the body proceeded against is not in fact a corporation.

The difference between the two proceedings has been thus stated: "A *scire facias* is proper where there is a legal existing body capable of acting, but who have been guilty of an abuse of the power entrusted to them; for as a delinquency is imputed to them, they ought not to be condemned unheard; but that does not apply to the case of a non-existing body. And a *quo warranto* is necessary where there is a body corporate *de facto,* who take upon themselves to act as a body corporate, but from some defect in their constitution they cannot legally exercise the powers they affect to use." Brice, 3rd ed., p. 779.

The proceedings may be brought only in the name of the Attorney-General and after obtaining his *fiat* for that purpose.

Under the Ontario Act the Lieutenant-Governor-in-Council has power to revoke and annul a charter. This is a cumulative remedy, and does not take away the right to proceed by *scire facias.*

Nature of *scire facias.*

"A *scire facias* is a judicial writ, founded upon some record, and requires the person against whom it is brought to show cause why the party bringing it should not have advantage of such record, or (as in the case of a *scire facias* to repeal letters patent) why the record should not be amended and vacated. It was, however, considered in law as an action; and, when brought to repeal letters patent, might in fact be an

original writ, returnable in Chancery, or a judicial writ returnable in the Superior Court. Sect. 27.

"Nothing is said in the Judicature Act or the Rule of the Supreme Court with regard to the writ of *scire facias;* but inasmuch as that writ was a judicial writ and the commencement of a new action on the judgment, and the Rules of Court provide that all actions hitherto commenced by writ shall be instituted by a proceeding to be called an action and that every action shall be commenced by a writ of summons, it may be doubted whether the old writ of *scire facias* is not abolished and an ordinary writ of summons indorsed with a claim for execution on the judgment substituted in its place. This view was adopted in the 13th edition of this work, but the old writ is treated by the highest authority as if it were an existing mode of procedure (Lindley, Partnership, 4th ed., p. 522 *et seq.*) and has been adopted in several cases since the Judicature Acts have been in operation. It is submitted that probably the old writ can still be issued." Archbold's Q.B. Practice, 14th ed., p. 1285.

"In all cases it is in law considered an action, because it may be pleaded to, and consequently since the Judicature Acts doubts have been entertained as to whether the action should not now be commenced by writ of summons, pursuant to R. S. C., Ord. II. r. 1; but the better opinion seems to be that the proceeding by writ of *scire facias* still remains, and instances of its use may be cited." See *Portal* v. *Emmens* (1876) 1 C. P. D. 201, 664; *Kipling* v. *Todd* (1878) 3 C. P. D. 350. Ency. Laws of Eng., vol. 11, p. 398.

Discretion to grant fiat.

The Attorney-General has a discretion as to the granting of a fiat, and the principles upon which he will act are discussed in the appended memorandum of the decision of the Attorney-General of Canada in the matter of the applications by certain shareholders of the Dominion Cold Storage Company for a fiat for the institution of proceedings by way of *scire facias* to annul its charter.

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The first petition was by Colin McArthur, a shareholder in the company, who was also one of the original applicants for the Letters Patent of incorporation.

The second petition was by George Foster and David Lowrey, who were shareholders.

The reasons urged were the same in both cases. The company was incorporated by Letters Patent under the Great Seal of Canada, pursuant to the provisions of the Companies Act. The Letters Patent bore date 28th September, 1895. It was alleged by the petitioners that although the petition for incorporation stated that 50 per cent. of the proposed capital stock had been subscribed, and 10 per cent. paid in thereon, yet there had been no *bonâ fide* subscription of stock, and no payments made in respect thereof; and that although the petition stated that $15,000, being the 10 per cent. alleged to have been paid in, was standing to the credit of D. A. McCaskill and Archibald McCaskill in trust for the company in the Molsons Bank at Montreal, yet the deposit was not made up of moneys paid in by the subscribers, but was the proceeds of a note which had been discounted by the McCaskills, promoters of the company, as a colorable compliance with the requirements of the Act, and that upon the Letters Patent being issued, the deposit was withdrawn by the McCaskills, and never went into the treasury of the company.

Re Dominion Cold Storage Co.

Opinion.

"The application was pressed upon the above mentioned grounds taken in the petition. From the papers on file and what was admitted at the hearing, it appears that Colin McArthur did not sign the petition for incorporation personally, being at the time absent in England. He did, however, by cable expressly authorize his son to sign the petition for him and the son signed in his father's name. Colin McArthur appears to have returned to Canada shortly before the Letters Patent were issued, and although he seems to have written the letter to Mr. Johnson, one of the promoters of the company, on 2nd October, 1895, asking permission to retire from the company, yet he does not appear

to have taken any further steps in the matter. It is not alleged that McArthur was at that time unaware of the irregularities in the incorporation of the company of which he now complains. He must or should have been aware of them. Sect. 27.

"The petitioners, George Foster and David Lowrey, subscribed for stock on or about 11th November, 1895, and became directors of the company. It is stated by their counsel that when they became stockholders they were ignorant of the facts set forth in their petition, that they shortly afterwards, however, ascertained those facts and thereupon resigned office as directors. It is suggested on the other side that their resignations were prompted by other motives. It is not necessary, I think, to consider the question of motive because they allowed more than a year to elapse between the date of their resignations and the institution of the winding-up proceedings without taking any steps for the purpose of having the charter cancelled, and they did not during that time nor until liquidation had been pending for several months communicate their information to this office. The liabilities of the company are stated to amount to $25,000, the principal portion of which has been incurred since the resignations of Foster and Lowrey from the directorate. Discretion to grant fiat.

"The application for a writ of *scire facias* is resisted by the liquidator and the creditors upon the ground among others that the creditors would be embarrassed and prejudiced in the collection of their claims if the charter were set aside.

"The purpose of a writ of *scire facias* in a case of this kind is a cancellation of a company's charter. That object may, however, be brought about in effect under the winding-up Act, and proceedings under that Act in this particular case have been for some time pending, and have passed through several stages. It seems, therefore, that the dissolution of the company would be more speedily attained by allowing the winding-up suit to proceed than by instituting new proceedings by way of *scire facias*. Such a course would also

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preclude the litigation and complications which would ensue if the charter were annulled by *scire facias*. In the latter event the ascertainment of the respective rights and liabilities of promoters, stockholders and creditors might be a matter of considerable difficulty and uncertainty, and there can be no doubt that the remedies of creditors would not be as speedy, convenient or fruitful as under the ordinary winding-up proceedings.

Re Dominion Cold Storage Co.

"It is perfectly clear under the combined effect of ss. 9, 68 and 78 of the Companies Act that no advantage can be taken on account of any irregularity in respect of matters preliminary to the issue of the Letters Patent unless it be in a proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling the Letters Patent.

"It is no ground for relief in equity in the suit of a shareholder against the company that the charter from the Crown or the grant to the company from a private person has been obtained by misrepresentation to the Crown or to such a grantor. It is for the Crown or the grantor, if either should complain of the fraud and misrepresentation, to take proceedings to set aside the charter or the grant: *MacBride* v. *Lindsay*, 9 Hare 573; Lindley on Companies, 5th ed., 99.

"Applications of this kind are not granted as a matter of right. They appeal to the discretion of the Attorney-General. That has been the view held by the department in the past, and it is the only view which can be acted upon consistently with the public interest: *Sarazin* v. *The Bank of St. Hyacinthe,* 20 R. L. 580; Gilmour's application against Van Horne and others, 20 R. L. 590. Also the case of the *Ontario & Western Lumber Company,* in which Sir Charles Hibbert Tupper, when Minister of Justice, revoked the first grant in a somewhat similar case to the present. The practice of the department is also in accordance with English authorities. In *Queen* v. *Presser,* 11 Beav. 314, it is laid down by the Master of the Rolls that the Attorney-General 'conducts an action of *scire facias* or

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permits it to be prosecuted, according to his own judgment and discretion, and may, when he thinks fit, stay the proceedings or enter a *nolle prosequi*. The control is his, subject only to the responsibilities to which every public servant is liable in the discharge of his duty, and subject to the jurisdiction which the courts may have over him, upon a charge properly brought against him for a negligent or erroneous performance of his duty. But I am of opinion that in the ordinary course of proceedings, upon a writ of *scire facias* to repeal Letters Patent, it is within his discretion to determine upon what or upon whose information or on what terms or security he will permit the action to be prosecuted; and that the exercise of his discretion and the conduct of the action is not subject to the control of the courts in which the proceeding takes place.' Grant's Law of Corporations, p. 299; *Regina* v. *The Eastern Archipelago Company*, 1 Ellis & Blackburn, pp. 354, 355.

Discretion to grant fiat.

"I am of opinion that the discretion thus vested in the Attorney-General should not in this case be exercised in favor of the applicants. Apart from the question as to whether a fiat for a writ of *scire facias* should be granted in any case with respect to a company which has ceased to do business and is in course of being wound up pursuant to statute, I think it may be held consistently with reason and authority that where a stockholder knowing of defects or irregularities in the incorporation of a company on account of which the charter of the company may be set aside has kept silent and stood by and taken the chance of the company's future success, which success could only arise through the subsequent dealings of the company with innocent persons who thereby became creditors of the company, it is too late after such liabilities have been incurred for a stockholder to set up such defects or irregularities to the prejudice of the creditors. Especially is this so, where, as in the present case, no application is made by the stockholder until after the company has failed and gone into liquidation." (26th January, 1898.)

Revoking fiat.

The fiat of the Attorney-General may be revoked by him, and in the following decision of Sir Charles Hib-

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bert Tupper, when Minister of Justice, in the case of *The Ontario and Western Lumber Co.*, the reasons for so doing are fully discussed.

Re Ontario & Western Lumber Co.

"Under the Joint Stock Companies Act the Governor in Council is given a discretionary authority to grant Letters Patent.

"The preliminary steps on the part of an applicant are laid down:—

" The petition must set forth certain facts.

"Among other things the stock subscribed is to be specified, and the deposit upon this is to be stated.

"Section 6 of the Act requires an applicant to establish 'to the satisfaction of the Secretary of State' the truth and sufficiency of the facts set forth. Section 65 is as follows:—

" 'In any action or other legal proceeding it shall not be requisite to set forth the mode of incorporation of the company otherwise than by mention of it under its corporate name, as incorporated by virtue of Letters Patent, or of Letters Patent and Supplementary Letters Patent, as the case may be, under this Act; and the notice in the *Canada Gazette* of the issue of such Letters Patent, or Supplementary Letters Patent, shall be *primâ facie* proof of all things therein contained, and on production of the Letters Patent, or Supplementary Letters Patent, or of any exemplification or copy thereof under the Great Seal, the fact of such notice shall be presumed; and except in any proceedings by *scire facias* or otherwise, for the purpose of rescinding or annulling the same, the Letters Patent, or Supplementary Letters Patent, or any exemplification or copy thereof, under the Great Seal, shall be conclusive proof of every matter and thing therein set forth."

Decision.

"And section 78 provides:—

" 'The provisions of this Act relating to matters preliminary to the issue of Letters Patent, or Supplementary Letters Patent, shall be deemed directory only, and no Letters Patent, or Supplementary Letters Patent, issued under this Act, shall be held void or

voidable on account of any irregularity in any notice prescribed by this Act, or on account of the insufficiency or absence of any such notice, or on account of any irregularity in respect of any matter preliminary to the issue of the Letters Patent or Supplementary Letters Patent.'" Sect. 27. Revoking fiat.

"The following facts taken from the papers filed with me on the present application are not in controversy:—

"Messrs. Dick & Banning, The Minnesota and Ontario Lumber Co., Messrs. Cameron & Kennedy, Messrs. Ross, Hall & Brown; The Western Lumber Co., and the Safety Bay Lumber Co., were respectively firms and corporations carrying on a general lumber business in the vicinity of Rat Portage, in the Province of Ontario.

"On or about the 29th day of April, 1893, the said firms and corporations entered into an agreement to consolidate their said businesses in a joint stock company, and for that purpose in and by said agreement transferred their respective property, assets and effects to certain trustees for the company so agreed to be formed.

"Pursuant to the terms of the said trust deed, the said several persons, firms and corporations mentioned herein, were incorporated pursuant to the provisions of chapter 119 of the Revised Statutes of Canada, being an Act respecting the incorporation of joint stock companies by Letters Patent known as 'The Companies Act' under the name of 'The Ontario & Western Lumber Company (Limited),' the said Letters Patent bearing date the 26th day of September, 1893.

"The applicants for the said Letters Patent consisting of J. A. McRae, J. M. Savage, Dennis Ryan, W. T. Creighton, W. R. Dick, Mary Banning, D. C. Cameron, H. W. Kennedy, Walter Ross, Richard Hall and Matthew Brown, and being the representatives of the said several firms and corporations who, being agreed to Re Ontario & Western Lumber Co.

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consolidate their said business as aforesaid pursuant to section 6 of the said 'Companies Act,' established to the satisfaction of the Secretary of State the sufficiency of the facts set forth in the said application and petition, and had duly issued to them by the Governor in Council, Letters Patent under the Great Seal of the Dominion incorporating them as aforesaid.

"On the 5th day of October, 1893, Dennis Ryan and The Minnesota and Ontario Lumber Company issued a writ against Douglas C. Cameron, Hugh William Kennedy, James Malcolm Savage, Walter Ross, W. T. Creighton, John Dick, James Pringle and J. N. Johnston, Cameron & Kennedy, The Western Lumber Company, The Safety Bay Lumber Company, W. R. Dick, Mary Banning, Richard Hall, Matthew Brown and John A. McRae, claiming, as shown by the statement of claim, the following relief:—

"(Here follows the prayer of the Statement of Claim in *Ryan* v. *Cameron*).

"Issue was joined and the cause stood ready for trial.

"Mr. Robinson, in his argument before me, stated that in this suit an unsuccessful application had been made to the Court for leave to add the name of the Attorney-General for Canada as a party. The Court held that it had no power to make the Attorney-General a party, consequently on the 4th June, 1894, the following petition was presented to the Right Honourable Sir John Thompson, the then Attorney-General:

"(Here follows a copy of the petition presented for the fiat).

"I am of opinion, after hearing argument, that this fiat as granted was intended to apply to the suit in which the application was made and to no other.

Revoking fiat.

"The prayer of the petitioners was, it is true, large enough to cover another action, but the permission is granted to use the name of the Attorney-General of Canada herein. The petition refers to deception, illegal representations, and suppression of facts as to

the grounds set up in the suit pending on June 4th, 1894. Sect. 27.

"That action had been brought to rescind an agreement which contemplated and was preliminary to the Letters Patent in question. The petition avers that in their action the defendants (some of the applicants for Letters Patent) have set up as a bar to the suit the granting of the Letters.

"It is further represented that the fraud and illegality alleged in the action thus pending cannot be established so as to obtain the desired relief without the use of the name of the Attorney-General.

"So soon as his fiat was granted a further action was instituted in the name of the Attorney-General against the Ontario and Western Lumber Co. for the purpose of cancellation of the charter. No other use was made of the Attorney-General's name.

"The ground in this action is the non-compliance with the Companies Act. Irregularities and defects in the proceedings preliminary to the Letters Patent are relied on and fraud against the Statute, with allegations in general of fraud, collusion and deception, is averred.

"At the trial the evidence appears to have been confined to the technical irregularities or to the alleged departure from the statutory directions. Mr. Robinson, in his argument before me, stated:—

"'Now, my learned friends complain here that in this section there is not a tittle of evidence of fraud; they say that there could not be, that it was not possible for us in this action and under the Letters Patent, to give any evidence of the fraud which they tell you we are charging them with. But you have only to read that agreement to see that we charge nothing of the kind. That has nothing to do with the validity or invalidity of the Letters Patent. Re Ontario & Western Lumber Co.

"'Now, what we complain of in the formation of this company is the non-payment of the ten per cent. and the improper subscription of stock, the non-subscription of stock as required by the charter.'

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"Mr. Gilmour gave as a reason for instituting a separate and other proceeding than the original suit, the following:—

" 'Another consideration was that, this fiat having been granted on the 4th June, the action of *Ryan* v. *Cameron* was set down for trial for the 21st of June, at Rat Portage, and it would have been impossible to complete the record in the new matter so as to go to trial at that date.'

"It is insisted with force that the Companies Act has been complied with. It is argued with greater force that a substantial compliance has been made, that a strong company has been organized with vast interests involved, and that the present litigation is due to a misunderstanding of the promoters touching their respective interests in the company.

"Without venturing to determine such points or others in dispute, I am satisfied that on the evidence before me the Attorney-General would not have allowed his name to be used for the purpose of annulling the charter of this company.

"While I do not impute bad faith on the part of the applicants, I do not think a complete statement of the material facts was disclosed to the Attorney-General. In any event I do not consider the suit of the *Attorney-General* v. *The Ontario and Western Lumber Company* was instituted with his authority.

"It appears, moreover, that the Secretary of State has been satisfied within the meaning of the Companies Act after an examination of papers not now challenged as fraudulent or wilfully false. The parties who applied for the fiat have, moreover, shown a readiness to cease their attack upon the charter if their own particular views are met.

Revoking fiat.

"From what I have already said it may be necessary to deal with the argument that a fiat once granted should not be revoked. In the case of *Queen* v. *Prosser* (XI. Beaven, p. 813) cited by Mr. Ritchie, it is said by Lord Langdale:—

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"'But the Attorney-General, proceeding regularly and being correct in such respects as these, conducts an action of *scire facias*, or permits it to be prosecuted, according to his own judgment and discretion, and may, when he thinks fit, stay the proceedings or enter a *nolle prosequi*. The control is his, subject only to the responsibilities to which every public servant is liable in the discharge of his duty, and subject to the jurisdiction which the courts may have over him, upon a charge properly brought against him, for a negligent or erroneous performance of his duty.'

"It was not, however, denied in the argument that I could control this suit, but it was insisted that under the circumstances I should not interfere.

"I have, it will be seen, concluded that the name of the Attorney-General is in this suit, being used without warrant. Under any circumstances I cannot agree that the cases referred to, by Mr. Robinson, apply. He argued that "*ex debito justitiæ*" the fiat should be granted in this case. The authorities relied on by him relate to what I conceive to be a wholly different class of cases. The case of the *Western Archipelago* (2 El. & Bl. 556) deals with a charter of a different character from the one before me. In it there was a proviso forbidding the corporation from trading until certain things were done, that is to say, until one-half of the capital had been subscribed for, and at least $50,000 paid up. A false certificate was given by the directors to the president of the board of trade, a certificate false to the directors' own knowledge. Martin, B., in his decision refers to the abuse and misuse of privileges conferred by the charter, and adds that for misuse or abuse a corporation may be dissolved (in this case it must be remembered that the Crown was of course pressing for the dissolution). He goes on to observe, 'There is a tacit, or implied condition annexed to all such grants as the present, that they shall not be misused or abused, and that if they be the charter or franchise is forfeited.' The judge goes on to cite other cases where the condition of a charter is broken. It is

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Sect. 27. important to note the following remarks: 'Slight deviation from the provisions of a charter would not necessarily be either an abuse or a misuse of it.'

" 'Talford, J., refers to the condition being disobeyed by the commencement of business by the corporation before the payment of the stipulated sum, and by the directors certifying with conscious falsehood that such payment had been made.'

Decision. "*The Dominion Salvage and Wrecking Co.* v. *The Attorney-General of Canada* (Vol. XXI. Sup. Ct. of Canada, p. 72), was referred to. This was not the case of a charter granted under the Companies Act; it was a case where the conditions of the grant (44 Vict., c. 61) were not complied with. Though Judge Gwynne dissented in this case some of his observations are of value here.

"Now in the present case the company having, although not within the six months, but before entering upon the operations for which they were incorporated, obtained subscriptions in their stock subscription books mentioned in the fourth section to an amount in excess of $100,000 of which more than $90,000 was paid in full, and having for two years actually carried on as a company the business for carrying on which they were incorporated and having in the course of such business entered into contracts with divers persons by which they incurred debts which they have been unable to pay and for non-payment of which they have been put in liquidation under the Winding-up Act, a judgment now rendered to the effect that by reason of non-compliance with the provisions of the fifth section, within six months from the passing of the Act, the Act of Incorporation ceased to have any effect, and became, and is, forfeited, cannot in my opinion be maintained. Such a judgment would be fraught with such infinite mischief and such injustice to parties who (during the two years that the company did *de facto* carry on the operations for which they were incorporated), became creditors of the company in the *bonâ fide* belief that they had *de jure* the existence which *de facto* they appear to have.

Revoking fiat.

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"I am satisfied that many irregularities exist in connection with the formation of joint stock companies in Canada under the Companies Act, and it is significant that no case has been mentioned, where, in the absence of gross fraud, the Attorney-General has attacked a company published to the world under the great seal of Canada as a body corporate and politic and as having 'established to the satisfaction' of the Secretary of State or of such other officer as may be charged by the Governor in Council to report thereon due compliance with the several conditions and terms in and by the Companies Act set forth and thereby made a condition precedent to the granting of such charter.

"To encourage attacks of the character in question upon these charters would, I conceive, be detrimental to the general business of the country. I have decided, therefore, to enter a *nolle prosequi* in this cause."

See also *Attorney-General* v. *Toronto Junction Club* (1904) 8 O. L. R. 440.

It is sufficient "use of the charter" under the section if the company becomes organized and stock is allotted; so in the case of an association incorporated for the purpose of constructing and maintaining a race course it was held that this need not be done in order to keep the charter alive: *Hepburn* v. *Connaught Park* (1916) 10 O. W. N. 333.

As to the effect of a revocation of the certificate of incorporation under the Nova Scotia Companies Act, see *The International Mining Syndicate* v. *Stewart* (1914-15) 48 N. S. R. 172.

Where an Alberta company had been struck off the register and was dissolved by virtue of the provisions of section 24 of the Companies Ordinance, it was held that the shareholders were entitled to bring in their own name a representative action to recover assets belonging to the company; and that such assets did not vest in the Crown as *bona vacantia*, but belonged to the shareholders as creditors of the company on its dissolution after the payment of all its other obligations: *Embree* v. *Millar* (1917) 33 D. L. R. 331.

Sect. 28. **General Powers and Duties of the Company.**

Powers given subject to this Act.

28. All powers given to the company by letters patent or supplementary letters patent shall be exercised subject to the provisions and restrictions contained in this Part. 2 E. VII., c. 15, s. 20.

As to real estate.

29. The company may acquire, hold, mortgage, sell and convey any real estate requisite for the carrying on of the undertaking of the company.

Loans

2. The company shall in no case make any loan to any shareholder of the company.

Property and power vested by incorporation.

3. The company shall forthwith upon incorporation under this Part, become and be vested with all property and rights, real and personal, theretofore held by it or for it under any trust created with a view to its incorporation, and with all the powers, privileges and immunities, requisite or incidental to the carrying on of its undertaking, as if it was incorporated by a special Act of Parliament, embodying the provisions of this Part and of the letters patent and supplementary letters patent issued to such company, 2 E. VII., c. 15, ss. 21 and 70.

The nature and extent of the powers of companies incorporated under acts resembling the Imperial Companies Act of 1862 are to be ascertained by reference to the act and the memorandum of association. Such a company is the creature exclusively of the statute and possesses only such powers as are included in the objects mentioned in the memorandum of association or are incidental or otherwise conducive to their attainment: *Riche* v. *Ashbury Railway, &c., Co.* (1874) L. R. 9 Ex. 224; *Att.-Gen.* v. *G. E. Ry.* (1879) 11 Ch. D. at p. 487. The same rule applies to companies incorporated under special Act, such as companies incorporated under Part II. of the Dominion Act. Any acts beyond the powers of such corporations are *ultra vires* and void.

Companies incorporated under Part I., however, derive their existence from the act of the Sovereign by the grant of a charter from the Crown, which confers on the company 'a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings': *Bonanza Creek Gold Mining Co.* v. *The King* (1916), A. C. 566, at p. 582. Pre-

viously to the last mentioned decision it was thought that the same rules applied in ascertaining the powers of companies incorporated by charter under the Companies Act of the Dominion and the Acts of those of the provinces which provide for this means of incorporation as those applicable to companies incorporated under a memorandum of association. The *Bonanza Creek Case* holds that the doctrine of *ultra vires* is not applicable to companies incorporated by charter "in the absence of statutory restriction added to what is written in the charter." "Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an Act not beyond its capacity, and is therefore not *ultra vires*, although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter," *ibid*, at p. 584. Sect. 29.

The specific question under consideration in the *Bonanza Case* was whether a company incorporated by Letters Patent under the Ontario Companies Act could acquire *ab extra* powers and rights outside the boundaries of the province. It was held that the company which was given by its charter power *inter alia* to carry on the business of mining, to acquire real and personal property, including mining claims, with incidental powers, had no authority as of right to exercise powers outside the province of its incorporation, but that it had a status which enabled it to accept from the Dominion authorities the right of free mining and to hold the leases in the Yukon which were in question in the action. However, the judgment of Viscount Haldane explicitly states that the doctrine of *ultra vires* does not apply to companies incorporated by charter in the absence of some restriction in its constating instruments, and presumably the case is a decision on the powers of companies generally. The question arises whether sub-section 3 of section 29 which states that the company shall have all powers requisite or incidental to the carrying on of its undertaking "as if it was incor-

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porated by special Act of Parliament, embodying the provisions of this Part and of the letters patent and supplementary letters patent issued to such company" impliedly cuts down the company's powers. Their Lordships in considering a somewhat similar provision of the Canadian Statute of 1864, 27 and 28 Vict. c. 23, which stated that every company incorporated under that Act was to be capable of exercising all the functions of an incorporated company as if incorporated by a special Act of Parliament, said, "Their Lordships so construe this provision as an enabling one, and not as intended to restrict the existence of the company to what can be found in the words of the Act, as distinguished from the letters patent granted in accordance with its provisions." The judgment adds that Part I. of the Dominion Act is framed on the same principle and that when Letters Patent are granted by Section 5 they constitute the shareholders a body corporate and politic for any of the objects, with certain exceptions, to which the legislative authority of the Parliament of Canada extends. Accordingly it seems that a Dominion company has all the powers of a common law corporation. See also Palmer's Company Law, 10th ed., p. 3, and the report in 79, L. J. Ch. 345 of *British South Africa Co.* v. *De Beers,* where Swinfen Eady, J., collects the authorities on the point.

The earlier view adopted by the Canadian Courts was that the doctrine of *ultra vires* was applicable to companies incorporated by Letters Patent. Thus in *Union Bank of Canada* v. *McKillop and Sons* (1915) 51 S. C. R. 510, 24 D. L. R. 787 a guarantee given by a company so incorporated was held to be *ultra vires.* See also *O'Neill* v. *London Jockey Club* (1915) 8 O. W. N. 602; *Smith* v. *Humbervale* (1915) 33 O. L. R. 452; *Helwig* v. *Siemon* (1916) 10 O. W. N. 296; *Ward* v. *Siemon* (1918) 43 O. L. R. 113; *Newhouse* v. *Northern Light, Power, &c., Co.* (1914) 29 W. L. R. 249.

In *Hepburn* v. *Connaught Park Jockey Club* (1916) 10 O. W. N. 333 the Letters Patent of a Dominion company empowered it to acquire real estate at Ottawa for the purpose of constructing and maintaining a race

course, &c., and this specific object was followed by the general words "the operations of the company to be carried on throughout the Dominion of Canada and elsewhere." It was held following the case of *O'Neill* v. *London Jockey Club* (1915) 8 O. W. N. 602 that these words did not confer the right to establish a race course at any place other than Ottawa. The Appellate Division in *Diebel* v. *Stratford Improvement Co.* (1916-17) 38 O. L. R. 407, dealt with the question of the company's power to enter into the contract there under consideration as a matter of construction on the wording of the Ontario Companies Act. See also *Re Gillies Guy, Ltd., and Laidlaw* (1917-18) 13 O. W. N. 11, 57; *Bank of Ottawa* v. *Hamilton Stove and Heater Co.* (1918) 15 O. W. N. 152; (1919) 44 O. L. R. 93. Sect. 29.

A recent amendment of the Ontario Companies Act, 6 Geo. V. c. 35, s. 6, passed after the decision in the *Bonanza Case,* expressly confers on the companies thereby affected "the general capacity which the common law ordinarily attaches to corporations created by charter." The recent judgment of the Ontario Supreme Court, Appellate Division, in *Edwards* v. *Blackmore* (1918) 42 O. L. R. 105, 42 D. L. R. 280, while decided in reference to a company governed by the above mentioned statutory provision, followed the Bonanza Case and is applicable to all companies incorporated by Letters Patent. This was an appeal from a judgment of Masten, J., who held that the doctrine of *ultra vires* did not apply to an Ontario company created by charter. Ferguson, J.A., and Lennox, J., affirmed the decision appealed from on this ground; Rose, J., on the ground that the contract was *intra vires,* having regard to the company's powers under its charter and its incidental powers under the Act, while Meredith, C. J. C. P., dissented. The following propositions are laid down by Ferguson, J. A.:

"A corporation created by charter had at common law almost unlimited capacity to contract, and . . . statements in the charter defining the objects of incorporation do not take away that unlimited capacity, and . . . even express restrictions in the charter do not

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take it away, but are simply treated as a declaration of the Crown's pleasure in reference to the purposes beyond which the capacity of the corporation is not to be exercised, a breach of which declaration gives to the Crown a right to annul the charter" (at pp. 116 and 117 of the report in O. L. R.).

"The enumeration in the charter of the objects for which the company is incorporated cannot be considered as a declaration that the company shall not do things other than those particularly set out, but . . . it requires at least express words of restriction in the charter, or the statute, to confine operations of the company, or even to confer upon a person aggrieved the right to apply to *scire facias* proceedings to cancel the charter" (at p. 118 of the report in O. L. R.).

See also on powers of companies *Temiskaming Telephone Co.* v. *Town of Cobalt* (1919) 44 O. L. R. 366, reversed, *Town of Cobalt* v. *Temiskaming Telephone Co.* (1919), 49 S. C. R. 93, restoring judgment in (1918) 42 O. L. R. 385.

It remains to consider, if there is a statutory restriction in the governing act, *e.g.*, where the company is forbidden to make loans to shareholders (s. 29 (2)), whether an act of the company in violation of such restriction is binding on the company.

In this connection a distinction has been drawn between powers vested in a company by reason of the fact of its incorporation by an act of the Sovereign, such as the capacity to bind itself by its contracts, and powers which are the creation of the governing act, such as the power to increase or decrease the capital stock or issue preference shares or issue share warrants. There appears to be no doubt that powers of the latter class can only be exercised in the manner and to the extent and subject to the conditions provided in the governing act. The enjoyment of powers of both classes by the Company would be "subject to the restrictions which are imposed on its proceedings" by statute. In the case of powers of both classes, *i.e.*, whether arising out of general corporate capacity or arising out of express statutory enactment, there is

no doubt that an exercise of the power in contravention of the statute is ineffective. Whether this is on the ground of *ultra vires* or illegality makes no difference in the practical result. See *Henderson* v. *Strang* (1919) 44 O. L. R. 617; (1919) 45 O. L. R. 215. This case has been appealed to the Supreme Court of Canada. Sect. 29.

See further Machen on Corporations, sections 1022-1025: *Copper Mines* v. *Fox* (1851) 16 Q. B. 229; *Ayers* v. *South Australian &c., Co.*, (1871) L. R. 3 P. C. 548; *Elve* v. *Boynton* (1891) 1 Ch. 501.

Summary.

The following conclusions may be stated.—

1. A company incorporated by charter under Part I has the general capacity of a common law corporation.

2. Express restrictions in the charter do not remove that capacity, but give the Crown a right to annul the charter for a breach of the restriction; and may possibly give a person aggrieved the right to apply by *scire facias* proceeding to annul the charter.

3. If there is an express restriction or prohibition in the governing act it must be complied with or observed under pain of nullity.

Acts of a company quite apart from their being prohibited by the charter, may be illegal as being contrary to public policy or forbidden by law. A company could not, for example, purchase land for the purpose of a lottery scheme: *Prevost* v. *Bedard* (1915) 51 S. C. R. 149.

The act itself expressly confers a number of powers which may briefly be summarized as follows:—

Incidental powers, ss. 5 and 29.

Power to apply for the change of the company's name, s. 21.

Power to establish offices and agencies, s. 30.

The right to apply for and obtain supplementary letters patent, s. 34.

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Power to purchase fractions of shares for the purpose of consolidation, s. 51 (2).

The right to maintain actions between the company and any shareholder, s. 99.

Interpretation Act.

Certain other powers and rights are conferred by the Interpretation Act, R. S. C. (1906) c. 1, s. 30, which is as follows:—

"In every Act, unless a contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall,—

(a) vest in such corporation power to sue and be sued, to contract, and be contracted with, by their corporate name, to have a common seal, to alter or change the same at their pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and to alienate the same at pleasure; and,

(b) vest in a majority of the members of the corporation the power to bind the others by their acts; and,

(c) exempt individual members of the corporation from personal liability for its debts or obligations or acts, if they do not violate the provisions of the Act incorporating them.

2. No corporation shall be deemed to be authorized to carry on the business of banking unless such power is expressly conferred upon it by the Act creating such corporation."

As to powers "necessarily and inseparably incident to every corporation" such as the power to sue and be sued, see *Powell-Rees Ltd.* v. *Anglo Canadian Mortgage Corporation* (1912) 26 O. L. R. 490, at p. 493.

Directors' by-laws.

The act gives the directors power to pass by-laws with reference to the following matters:—creation of preference shares, s. 47; consolidation of shares, s. 51; increase of capital, s. 52; reduction of capital, s. 54; the borrowing of money, s. 69; allotment of stock, calls, share certificates, forfeiture of stock, transfer

of stock, dividends, qualification and remuneration of directors, appointment of agents, officers and servants, meetings, penalties, and the conduct of the affairs of the company, s. 80. The directors may also repeal, amend and re-enact by-laws, s. 81. Sect. 29.

Restrictions.

Restrictions.

The Act contains a number of restrictions to which companies incorporated under it are subject:—

1. Before a company may commence its operations or incur any liability, it is required by section 26 that 10 per cent. of its authorized capital shall have been subscribed and paid for. See however, the note to that section.

2. Powers given by the letters patent shall be exercised, subject to the restrictions and provisions of Part I. of the Act.

3. The company may not use its funds in the purchase of stock or other companies until a by-law has been passed in conformity with section 44.

4. No dividend shall be passed which will impair the capital of the company, s. 70.

5. Loans to shareholders are forbidden, s. 29 (2).

If this prohibition is contravened the loan is *ultra vires*, and an objecting shareholder is entitled to a decree directing the restoration of the money to the company: *Henderson* v. *Strang* (1919) 43 O. L. R. 617; (1919) 45 O. L. R. 215; under appeal to Supreme Court of Canada.

But a loan to a firm of which the shareholder is a member is not within the prohibition, at any rate where the firm by the law of its domicil is a legal entity, separate from the individuals who compose it, *ibid.*

Exercise of powers.

Where a company has permissive powers which are capable of being exercised without the creation of a nuisance and which are conferred without provision being made for compensating persons injured by their exercise, they must be used so as not to create a nuisance: *Hopkins* v. *Hamilton Electric* (1910) 2 O. L. R.

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240. The general rule of law is that if the thing complained of, although an act which would otherwise be actionable, be authorized by statute, then no action will lie in respect of it, if it be the very thing the legislature has authorized. If it be not the very thing authorized an action will lie: *Fieldhouse* v. *City of Toronto* (1919) 43 O. L. R. 491 (App. Div.) where the authorities are collected. See also *Leighton* v. *B. C. Electric Co.* (1914) 17 D. L. R. 117; (1914) 18 D. L. R. 505 and cases cited.

Delegation or transmission of powers.

Powers granted to a corporation by charter cannot be delegated or transmitted: *Sandwich Windsor &c. Ry.* v. *City of Windsor* (1917-18) 13 O. W. N. 336, and cases cited.

Powers conferred and duties imposed by the Legislature on log driving companies cannot be delegated or transferred and no action is maintainable on a contract based on such a transfer: *Lynch* v. *William Richardes Company* (1905-8) 38 N. B. R. 160.

A company cannot by resolution delegate to the president or other officer the powers vested by law in the directors: *Twin City Oil Co.* v. *Christie* (1909) 18 O. L. R. 324.

It is only ministerial acts or acts of administration merely, that can be delegated, and not the discretionary powers of the board of directors: *Tanguay* v. *Royal Paper Mills* (1907) Q. R. 31 S. C. 397.

Provincial legislation affecting Dominion companies.

It is established that Provincial legislatures may to a certain extent enact laws for the regulation, taxation, and licensing of Dominion Companies. The question of the legality of the various provisions in force in the different provinces is beyond the scope of this note in which some of the more recent decisions only and principles therein laid down are referred to.

Legislation excluding Dominion corporations, because not registered or licensed (where a license may be refused) from resorting to the provincial courts to enforce contracts made in pursuance of the powers granted by their charter are *ultra vires: John Deere*

Plow Co. Ltd. v. *Wharton* (1915) 84 L. J. P. C. 64; (1915) A. C. 330; 19 D. L. R. 353; *Linde Canadian Refrigerator Co.* v. *Saskatchewan Creamery Co.* (1915) 51 S. C. R. 400, 403. A province can not interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carries with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion: *John Deere Plow Co., Ltd.* v. *Wharton, supra.* On the other hand the Lord Chancellor said "It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by s. 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the province as to mortmain, *Colonial Building and Investment Association* v. *Att.-Gen. of Quebec* (53 L. J. P. C. 27; 9 App. Cas. 157); or escape the payment of taxes, even though these may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies, *Bank of Toronto* v. *Lambe* (56 L. J. P. C. 81; 12 App. Cas. 757). Again such a company is subject to the powers of the Province relating to property and civil rights under Section 92 for the regulation of contracts generally, *Citizen Insurance Co.* v. *Parsons* (51 L. J. P. C. 11; 7 App. Cas. 96)."

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Subject to provincial laws of general application.

Taxes.

License.

Their Lordships refrained from stating any general principles beyond observing that it might be competent to a legislature "to pass laws applying to companies without distinction, and requiring those which were not incorporated within the province to register for certain limited purposes, such as the furnishing of information;" also "to enact that any company which had not an office and assets within the province should under a statute of general application regulating procedure, give security for costs."

Suggested *intra vires* legislation.

Since the above decision it has been held that the provisions of the Companies Act (1915) Sask., which

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requires *all* companies to register and take out an annual license, are *intra vires* and are applicable to Dominion companies: *Harmer* v. *Macdonald Co. Ltd.* (1917) 33 D. L. R. 363; (1919) 59 S. C. R. 45. It is understood that an appeal is being taken to the Judicial Committee of the Privy Council.

Prince Edward Island.

The Prince Edward Island Act of 1913, requiring a sworn statement to be filed by every company not incorporated by or under the authority of an Act of the Legislature of Prince Edward Island, carrying on business in Prince Edward Island and having gain for its purpose or object, is *intra vires,* and a contract entered into by a company which has not complied therewith is void: *Willett Martin Co.* v. *Full* (1915) 24 D. L. R. 672.

Manitoba.

In *Davidson* v. *Great West Saddlery Co.* (1917) 35 D. L. R. 526; (1919) 59 S. C. R. 45, it was held that a Province has power under s. 92, of the B. N. A. Act to compel under penalty, a Dominion company to take out a license as a condition precedent to carrying on business and holding lands within its territory, and that Part iv. of the Manitoba Companies' Act, R. S. M. (1913) Ch. 35 is intra vires. This case is under appeal to the Judicial Committee of the Privy Council.

Ontario.

In *Currie* v. *Harris Lithographing Co.* (1918) 41 D. L. R. 227; 41 O. L. R. 475, the Supreme Court of Ontario, Appellate Division, held that the provisions of the Extra-Provincial Corporations Act R. S. O. 1914, c. 179, except the latter part of s. 16 (1) are *intra vires* so far as they apply to a company incorporated under the Dominion Companies Act, R. S. C. c. 129 (1906) carrying on business in Ontario, and with its chief place of business in Ontario. Such company is precluded from carrying out its objects and undertakings in Ontario until it becomes licensed; it is subject to the penalties prescribed in the Act for carrying on business, and is prohibited from holding lands for the purposes of its business without being licensed under the Act.

That part of s. 16 which provides that so long as a company remains unlicensed it shall not be capable of

maintaining any action or other proceeding in any court in Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on in contravention of the provisions of Sec. 7 was held *ultra vires*. Sect. 29.

It was also held that a Dominion company is subject to and bound to obey the statutes of the province as to Mortmain. The words "of a statute for the time being in force" contained in s. 3 of the Mortmain and Charitable Uses Act, R. S. O. c. 103, apply only to a statute of the Province, and the words "His Majesty" where the first occur in the section mean His Majesty so acting by the Lieutenant Governor of the Province, and where they occur the second time mean His Majesty in right of the province. The Act is an Act of general application. The above case is also under appeal.

Where a Dominion trust company has applied for a license and as a term of receiving it has given a bond, neither the company nor the surety can attack the validity of the bond on the ground that the company could have done business in the province without a license: *A. G. for Ontario* v. *Railway Passengers Assurance Co.* (1918) 43 O. L. R. 108 (App. Div.).

A Dominion company is, in common with other companies, firms and persons engaged in similar business, liable to pay a license tax imposed by a municipality: *Re Major Hill Taxicab Co.* v. *City of Ottawa* (1915) 7 O. W. N. 747.

In *Re Dominion Marble Co. In Liquidation* (1917) 35 D. L. R. 63, it was held that a Dominion company is subject to the limitation that in carrying out its objects it must comply with the law relating to property and civil rights in each of the provinces. As a result it was held that the company in liquidation had no authority to create in favour of a trustee for bond holders, a privilege upon its movable property in view of the local law in force in the Province of Quebec, making movables insusceptible of hypothecation. By an amendment to the Quebec Companies Act (1914) Quebec.

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4 Geo. V. Ch. 51, authority is now given for the pledging and mortgaging of movable property to secure bonds, and authorizing such pledges or mortgages.

Statutory Corporations.

The rule that companies incorporated by charter have all the powers of a natural person does not apply to companies incorporated under Part II. of the Act, which are statutory companies. To these the doctrine of *ultra vires* applies. Moreover, if the law rests as declared in *Edwards* v. *Blackmore,* legislative steps will doubtless promptly be taken to restrict the powers of companies to those set out in the letters patent supplemented by the powers conferred by the governing act itself. Accordingly a statement of the principles of the doctrine of *ultra vires* is given below.

Principles applicable in determining extent of powers.

The method to be adopted for ascertaining whether any given act is *intra vires* or not is stated in *Atty.-Gen.* v. *Mersey Railway* (1907) 1 Ch. 81, at page 99, to be as follows: "The main purpose must first be ascertained; then the special powers for effectuating that purpose must be looked for; and then if the act is not within either the main purpose or the special powers expressly given by the Statute, the enquiry remains whether the act is incidental to or consequential upon the main purpose and is a thing reasonably to be done for effectuating it." The case was reversed in (1907) A. C. 415, but the above statement by Buckley, L.J., was not dissented from.

To the above rules of construction must be added the "primary object" rule which is that where the objects of a company set forth a number of powers the paragraphs containing the main or dominant objects must first be looked at and all other clauses are to be regarded as merely ancillary to the main object and not as conferring independent powers: *German Date Coffee Company* (1882) 20 Ch. D. 169.

It has been held in England that this rule applies even though the memorandum of association expressly

states that each paragraph is to be read separately and not restricted by any other paragraph: *Stephens* v. *Mysore Reefs, (Kangundy) Mining Co.* (1902) 1 Ch. 745. But see *Butler* v. *Northern Territories Mines of Australia* (1907) 96 L. T. 41, which decided that the primary object rule, being only of *prima facie* application, may be expressly excluded by the terms of the memorandum of association; and see *Cotman* v. *Brougham* (1918) A. C. 514. Sect. 29.

It appears in every case to be a question of construction based upon a consideration of the whole memorandum of association or charter.

Effect of ultra vires Acts.

Ultra vires Acts are void and cannot be ratified.

An Act which is clearly beyond the powers given to a company by its instrument of incorporation cannot be ratified even by the unanimous resolution of all the shareholders: *Ashbury* v. *Riche* (1875) L. R. 7 H. L. 653. Such an act being *ultra vires*, is null and void. In this case Lord Cairns at page 672 points out the necessity of carefully distinguishing between an illegal act and an act which is *ultra vires*, in dealing with the powers of companies. He says, "The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract."

It has been held further that a judgment by consent or by way or compromise against a corporation to enforce an *ultra vires* agreement is void, being of no more effect than the contract itself: *G. N. W. C. Ry. Co.* v. *Charlebois* (1899) A. C. 114 and see *Re New Zealand Land Company, Jackson's Case* (1888) 6. N. Z. L. R. (S. C.) 549. See also *Hughes* v. *Northern Electric and Manufacturing Co., Limited* (1915) 50 S. C. R. 626.

A company will not be estopped by deed or otherwise from showing that the act which it purports to have done, or the contract which it is alleged to have made, was beyond its corporate powers, and is, therefore, a nullity as regards the company: *Baroness Wen-*

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lock v. *River Dee Co.* (1887) 36 Ch. D. 675n, 10 App. Cas. 354; *Ex parte Watson* (1888) 21 Q. B. D. 301, at p. 302. And persons who deal with the company cannot hold it liable for an attempted exercise of powers which it does not possess: *Balfour* v. *Ernest* (1859) 5 C. B. N. S. 601; *Mahony* v. *East Holyford, &c., Co.* (1875) L. R. 7 H. L. 869. This principle does not apply, however, where the act in question is not outside of the powers of the company altogether, but is one which has been performed without the observance of some formality which is a mere matter of internal management: *County of Gloucester Bank* v. *Rudry, &c., Co.* (1895) 1 Ch. 629; *Mahony* v. *East Holyford Co., supra,* and *Royal British Bank* v. *Turquand* (1855) 5 E. & B. 248 and 6 *ib.* 327. In such case it will be assumed that the necessary requirements have been observed: *Colonial Bank of Australasia* v. *Willan* (1874) L. R. 5 P. C. 417, and the cases just cited above, and it is not incumbent on the person dealing with the company to ascertain that all its proceedings have been regular, *ibid.* But, although the company cannot be held to a contract which is *ultra vires* of it, a remedy may exist against the directors who induced the contract: *Weeks* v. *Propert* (1873) L. R. 8 C. P. 427; *Looker* v. *Wrigley* (1882) 9 Q. B. D. 397.

See also on estoppel annotation in (1917) 36 D. L. R. 107.

The effect of the rule that a company cannot be bound in respect of *ultra vires* acts is cut down by two remedies which a person may exercise who deals with a company in ignorance of the fact that it is exceeding its powers. (1) Such person may be entitled to sue the directors on an implied warranty of authority on their part to bind the company.

(2) In case of a loan he may be entitled to be subrogated to the rights of creditors who have been paid off out of the proceeds of his loan.

Implied warranty.

Implied Warranty.—If directors represent that they have authority to enter into a transaction, where as a matter of fact they have not, and the party to

whom the representation is made, acting upon it, incurs loss, he may sue the directors for damages: *Firbanks Executors* v. *Humphreys*, 18 Q. B. D. 54; *Whitehaven Joint Stock Bank* v. *Reed* (1886) 54 L. T. 360 C. A. Sect. 29.

Quasi-subrogation.—In the case of an *ultra vires* borrowing by a company, the lender has no right of action against the company in respect of the contract of loan itself. Nor can he enforce any securities given for such loan. However, if the money has not been spent by the company he is entitled to prevent the company from parting with it; and further, if the money advanced has been expended in paying the lawful enforceable debts of the company he is entitled to stand in the shoes of the creditors so paid off, but he is not entitled to the benefit of such securities as the creditors may have held in respect of their debts: *Blackburn Benefit Building Society* v. *Cunliffe Brooks*, (1882) 22 Ch. D. 61; (1884) 9 App. Cas. 857. See also *Royal Bank* v. *B. C. Accident* (1917) 35 D. L. R. 650; *Sinclair* v. *Brougham* (1914) A. C. 398. Quasi-subrogation.

It is immaterial whether the debts were in existence at the time of the advance or not: *Baroness Wenlock* v. *River Dee* (1887) 19 Q. B. D. 155.

Incidental Powers of Companies.

Dicta will be found in many cases to indicate that a company possesses certain powers in virtue of its being a corporate body, *e.g.*, a power *bona fide* to compromise any dispute whatever is incident to the legal existence of the *persona* of a body corporate, per James, L.J., in *Bath's Case* (1878) 8 Ch. D. 334; see also *Powell Rees* v. *Anglo Canadian Mortgage Corporation* (1912) 26 O. L. R., at page 493. It is doubtful, however, whether too much reliance should be placed upon such expressions of judicial opinion as a different principle is clearly enunciated in *Ashbury, etc., Railway Co.* v. *Riche* (1875) L. R. 7 H. L. 653, and the true principle would seem to be that the possession of incidental powers by a company, or powers not specifically mentioned in the instrument of creation,

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depends not on its being a corporate body, but on its having implied power to do "whatever is fairly and reasonably necessary to effectuate its specified objects."

It is not possible to state in regard to any given company incorporated for the purpose of engaging in certain specified undertakings, just what powers it possesses other than those expressly given it. The words "All the powers, privileges and immunities necessary for the carrying on of its undertaking" or similar words occurring in almost all companies acts are very wide. It is a matter of construction in every case to determine whether or not a certain power is *intra vires* of the company under consideration when such power has not been specifically mentioned in its charter or other instrument of creation; and in construing such instrument the ordinary rules of construction usually applied in interpreting written documents should be followed, per Selwyn, L.J., in *Re International Contract Co.* (1869) 17 W. R. 454, at p. 459; 20 L. T. 96, at p. 100; to which may be added the words of Davey, J., in *New Zealand, &c., Co.* v. *Peacock* (1894) 1 Q. B. 622, at p. 632, "The memorandum ought to be read fairly and not so as to make this scheme *ultra vires* if it is otherwise unobjectionable." See also *Union Bank of Canada* v. *McKillop* (1914) 30 O. L. R. 87, at page 98. In *Williams* v. *Crawford Tug Co.* (1907) 16 O. L .R. 245, it was held that a tug company had no implied power to guarantee the price of a boiler to be purchased by the tug owner employed by the company; see also *Carter* v. *Columbia Bitulithic Co.* (1914) 18 D. L. R. 520; *Re Pengelly-Akitt, Ltd., Jacques Case* (1914) 16 D. L. R. 79, but see *A. E. Thomas, Ltd.* v. *Standard Bank* (1909-10) 1 O. W. N. 379 and 548, where under the circumstances in question the power to guarantee was implied.

In *Union Bank of Canada* v. *McKillop* (1914) 30 O. L. R. 87 and affirmed (1915) 51 S. C. R. 518, the defendant was a company incorporated under the Ontario Companies Act, R. S. O. (1897) c. 191 with power

to buy, sell and deal in timber and lumber, operate saw mills, etc. The giving of a guarantee for a debt of a company whose sole connection with the guarantor was that of a customer was held to be *ultra vires*. But where the company's powers authorize it to "guarantee the contracts of or otherwise assist" any company carrying on any business which the guaranteeing company is authorized to engage in, a guarantee by the latter of the account of a company carrying on such business is *intra vires*: *Bank of Ottawa* v. *Hamilton Stove and Heater Co.* (1919) 44 O. L. R. 93. Sect. 29.

The following reported decisions afford further illustrations of the application of the foregoing principles in specific cases:—

To Make Contracts.

For the general rule see judgment of Gwynne, J., in *Hovey* v. *Whiting* (1886) 14 S. C. R. 515, at p. 531.

A company may not assign all its rights and powers absolutely: *Atty-Gen.* v. *The Niagara Falls International Bridge Co.* (1873) 20 Gr. 34. But a railway company may lease a portion of its road to another company and assign all its rights and privileges as to the portion so leased: *Michigan Central Ry. Co.* v. *Wealleans* (1894) 24 S. C. R. 309, but see *Hinckley* v. *Gildersleeve* (1872) 19 Gr. 212, and see also *Montreal Telegraph Co.* v. *Law* (1883) 27 L. C. Jurist 257, at p. 277.

Distinction between contracts executed and contracts executory: *The Garland Manufacturing Co.* v. *The Northumberland Paper and Electric Co., Limited* (1900) 31 O. R. 40. See *Young* v. *Bank of Nova Scotia* (1915) 34 O. L. R. 176.

Where directors had bought goods on the credit of the company which by the act of incorporation it had no power to buy, they were held not liable on a warranty of authority or otherwise, the representation being one of law and not of fact: *Struthers* v. *Mackenzie* (1897) 28 O. R. 381.

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See also *Great Western Railway Co.* v. *Preston and Berlin Co.* (1857) 17 U. C. R. 477; *Calvin* v. *The Provincial Insurance Co.* (1869) 20 U. C. C. P. 267; *Bernardin* v. *Municipality of North Dufferin* (1891) 19 S. C. R. 581; *Fairchild* v. *Ferguson* (1892) 21 S. C. R. 484; *Charlebois* v. *Delap* (1895) 26 S. C. R. 221.

A power by statute or charter purporting to authorize a company to sell its undertaking does not alone without express words give a power to sell for shares in another company: *Hill* v. *Starr Manufacturing Company* (1914) 15 D. L. R. 146.

The power to dispose of lands carries with it the power to lease: *Dominion Cotton Mills* v. *Amyot* (1912) 4 D. L. R. 306.

To Borrow Money and to Mortgage.

To borrow money and to mortgage.

A company authorized to borrow and to mortgage can take a bond as additional security for money overdue upon it: *Hope* v. *Glass* (1863) 23 U. C. R. 86.

Where the terms upon which money is borrowed or a mortgage given by a company are not illegal it is within its powers to pay a bonus for the accommodation obtained: *Farrell* v. *The Caribou Gold Mining Co.* (1897) 30 N. S. R. 199.

Directors of a company were authorized to execute a mortgage to parties who had agreed to advance the sum of $30,000 to enable the company to acquire certain mining property which they desired to purchase, and to include in such mortgage bonuses amounting in all to $10,000. Held, that the company being a trading corporation, had as such, power to borrow money and to mortgage, and that as long as the terms upon which the money was borrowed, and the mortgage given, were not illegal, there could be no objection to paying a bonus for the accommodation obtained: *Farrell* v. *The Caribou Gold Mining Co.* (1897) 30 N. S. R. 190.

The power to borrow money implies the power to mortgage. Directors of a company incorporated under the Act of 1852, c. 2 (Rev. Stats. N.S., 3rd Series, 750) have power to mortgage the property of the company to discharge obligations for which the sharehold-

ers are liable, and would continue personally liable if there was no mortgage: *In re Nash Brick and Pottery Manufacturing Co.* (1873) 3 N. S. R. 254. Sect. 29.

A company which has power to advance moneys on mortgage securities has power to do everything necessary to protect such security or to realize upon it, and if the company is a second mortgagee it has power by implication to do those things which might result from the working out of the relation subsisting between first and second mortgagees, such as a power to redeem the first mortgage. And if such a company take a mortgage upon leasehold property it may pay the rents reserved in order to avoid a forfeiture, and may also pay the proper expenses of maintaining and working the property where its productiveness is thus attained: *Sheffield, &c., Society* v. *Aizlewood* (1889) 44 Ch. D. 412. Lend on mortgage.

See also *Western Assurance Co.* v. *Taylor* (1862) 9 Gr. 471; *Reid* v. *Whitehead* (1864) 10 Gr. 446; *The Corporation of North Gwillimbury* v. *Moore* (1865) 15 U. C. C. P. 445; *Edinburgh Life Assurance Co.* v. *Graham* (1860) 19 U. C. L. R. 581; *Victoria Mutual Fire Insurance Co.* v. *Thompson* (1882) 32 U. C. C. P. 476; 9 A. R. 620; *Sheppard* v. *Bonanza, &c., Co.* (1894) 25 O. R. 305; *Royal Bank* v. *B. C. Accident* (1917) 35 D. L. R. 650.

When one of the objects for which the company is incorporated is to acquire, sell and dispose of lands of a certain description the company has power to give a mortgage as security for purchase money and to give a covenant therein to pay such purchase money: *Sheppard* v. *Bonanza Nickel Co.* (1894) 25 O. R. 305; see also *Kirkpatrick* v. *Cornwall Electric Railway Co., Ltd.* (1901) 2 O. L. R. 113. This was a case of an electric street railway company incorporated under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. (1887) c. 157, which gave the directors power to borrow money upon the credit of the company under the sanction of a by-law of the shareholders; and under the like sanction to hypothecate mortgage or pledge

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the real or personal property of the company to secure any sum or sums borrowed for the purposes thereof. It was held that this section did not restrict the power of mortgaging to the existing property of the company; per Osler, J.A., at page 117, "There is nothing in the act which expressly or by implication restricts the exercise of the power to its then existing property. In this respect it seems to me that the company is invested with as large powers to mortgage its ordinary after acquired property as belongs to an individual person." See also *Perth Flax and Cordage Co.* (1909) 13 O. W. R. 1140.

To Pay Interest.

To pay interest.

In an action for the interest on bonds issued by a company under 37 Vict. cap. 57 (Que.), the defendants pleaded that the Legislature could not enact a law authorizing the company to enter into any contract binding on it by which a rate of interest higher than six per cent. was to be paid, and the coupons being at the rate of seven per cent. the obligation was void, or at most good only for six per cent. It was held, however, that the company being authorized to borrow could legally agree to pay seven per cent. or such other rate as might be specially agreed upon: *Macdougall* v. *Montreal Warehousing Co.* (1880) 3 L. N. 64.

Corporations other than banks may validly lend at any stipulated rate of interest: *Royal Canadian Insurance Co.* v. *Montreal Warehousing Co.* (1880) S. C. 3 L. N. 155; *McHugh* v. *Union Bank of Canada* (1913) A. C. 299.

To Lend Money.

To lend money.

The power to loan is a common power to be inserted, and its omission from the memorandum of a trading company is significant. Thus where there was no express power to loan it was held that a company incorporated to carry on a general contracting business had no implied power to make a loan to another company, and that a chattel mortgage taken therefor was invalid: *Columbia Bitulithic Co.* v. *Vancouver*

Lumber Co. (1914) 20 D. L. R. 954; (1915) 21 D. L. R. 91. The company might have the right to sue for the return of the money, *ibid.* Sect. 29.

To Issue Shares at a Discount.

Without being especially empowered to do so a company cannot make allotments of its capital stock at a rate per share below the face value: *Northwest Electric Co.* v. *Walsh* (1898) 29 S. C. R. 33; *Re Clinton Thresher Co.* (1910) 20 O. L. R. 555. It is *ultra vires* to issue fractions of a share: *McGill Chair Company* (*Munro's Case*) (1912) 26 O. L. R. 254.

A company incorporated under the Manitoba Act was held to have no power to bargain away paid up shares for a mere covenant or agreement to do certain future acts as to which upon non-performance the company's right would be to damages only: *Winnipeg Hedge and Wire Fence Co., Limited* (1912) 1 D. L. R. 316, *Jones and Moore Electric,* 18 Man. L. R. 549, followed (*sed quære*).

A company after it has improperly issued shares at a discount has no power to cancel them: *McGill Chair Company, Munro's Case* (1912) 26 O. L. R. 254. If, however, certificates have not been issued and the contract to take shares is still executory a resolution may be passed cancelling them: *Re Matthew Guy Carriage and Automobile, Thomas's Case* (1912) 3 O. W. N. 902.

While a company may not issue its shares at a discount there is no rule which absolutely prevents directors representing the company from selling shares at par where they are at a premium on the market: *Harris* v. *Sumner* (1908) 5 E. L. R. 161.

To Acquire, Hold and Dispose of Land.

This power is expressly covered by Section 29. Apart from the Act the law is as follows:

A company empowered to hold land for a definite purpose only may take a conveyance of land for another purpose, and the Crown alone can take advantage

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of the disability, and the company can convey its defeasible title: *Becher* v. *Woods* (1865) 16 U. C. C. P. 29; *McDiarmid* v. *Hughes* (1888) 16 O. R. 570. So also if a company has power to hold land for a definite period only, without any provision as to reverter, and holds beyond that period, the Crown alone can take advantage of it: *McDiarmid* v. *Hughes,* and this case is authority for saying that in Ontario, at all events, though the Statutes of Mortmain have been held to be in force in that Province, the position is the same though the company has not been empowered to hold lands at all, if it has not been expressly prohibited from doing so.

Hold and sell land.

An insurance company had power to hold real estate for the immediate accommodation of the company "or such as shall have been *bona fide* mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealing." It had also power to invest its funds in mortgages of real estate. The company sold a vessel and took from its vendee mortgages on real estate for securing the purchase money. It was held that this transaction was *intra vires*: *Western Assurance Co.* v. *Taylor* (1862) 9 Gr. 471.

Only the Crown can take advantage of the forfeiture which a company incurs by holding land when not empowered to do so: *McDiarmid* v. *Hughes* (1888) 16 O. R. 570.

A company incorporated by private Act, having obtained an indefeasible title to real property under the Land Registry Act for purposes not authorized by the incorporating Act, may enter into an agreement for sale of the property and sue to recover arrears of payments due thereon: *Hudson Bay Ins. Co.* v. *Creelman* (1918) 40 D. L. R. 274; (1919) 48 D. L. R. 234 (P.C.).

To hold land.

A *bona fide* agreement to sell is sufficient to prevent a forfeiture: *London and Canadian Loan and Agency Co.* v. *Graham* (1888) 16 O. R. 329. See also *Becher* v. *Woods* (1865) 16 U. C. C. P. 29; *Sheppard* v. *Bonanza, &c., Co.* (1894) 25 O. R. 305.

Reduce Capital or Repurchase Shares. Sect. 29.

Reduce capital or repurchase shares.

To an action for a call on stock by the liquidators of a company, the defendant pleaded that he had subscribed for 80 shares of stock, on which he had paid 10 per cent. Subsequently at a meeting of the shareholders duly called for that purpose it was decided in the interests of the company to reduce the capital from $1,000,000 to $250,000 by accepting a payment of 15 per cent. on the shares, and exchanging them with the shareholders for one quarter of the number of shares fully paid up. The defendant agreed to this arrangement and after paying up 15 per cent. of his shares, making 25 per cent. paid in all, he received from the managing director 20 paid up shares for the 80 shares held by him. This was done in good faith and in pursuance of the resolution of the shareholders authorizing it. It appeared that if the arrangement had been fully carried out it would have realized a sum sufficient to pay all the liabilities of the company.

Held, however, that the company, without being specially authorized, could not reduce its capital, nor purchase, or accept a surrender of its shares, and the transaction was therefore *ultra vires* and void: *Ross* v. *Fiset* (1882) 8 Q. L. R. 251 S. C.

Where a person has regularly become a shareholder the company has no power to acquire its own shares by transfer or surrender from the shareholder apart from the remedies it is authorized to enforce for non-payment of calls: *Re Winnipeg Hedge and Wire Fence Company* (1912) 1 D. L. R. 316; *Smith* v. *Gowganda* (1909-10) 44 S. C. R. 621; *Colonial Assurance Co.* v. *Smith* (1913) 12 D. L. R. 113.

See *Stavert* v. *McMillan* (1911) 24 O. L. R. 456, affirmed on appeal (1913) 13 D. L. R. 761 (P.C.).

Nor will a company be bound by a contract to resell or purchase its own shares issued to a subscriber: *Helwig* v. *Siemon* (1910) 10 O. W. N. 296; *Ward* v. *Siemon* (1918) 43 O. L. R. 113; in *Re Colonial Assurance Co.; Crossley's Case* (1917) 34 D. L. R. 341, a transfer by a shareholder in compromise of an action

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of partly paid shares to a trustee for the company was held not to be a trafficking by the company in its shares.

The following method of providing a company with working capital was held not to be a purchase by the company of its own shares. Under an agreement of the members of a syndicate which organized the company a number of shares issued as fully paid up in consideration of the transfer of assets to the company were transferred to the president and secretary of the company for the purpose of providing funds for the organizing of the company and providing it with working capital. A portion only of the shares were sold and the company having become prosperous and there being no immediate prospect of further capital being required an action was brought by members of the syndicate to make the directors of the company account to them for the unsold balance. It was held that this was not a wrongful acquisition by the company of its own shares; that the syndicate had retained no individual interest in the shares; that the words "for the purpose of providing funds" simply showed the way in which the funds were to be used, but did not put any limitation upon the beneficial interest which was transferred; and that the directors were not bound to account for the unsold shares: *Black* v. *Carson* (1913) 7 D. L. R. 484; (1917) 36 D. L. R. 772 (P.C.).

In carrying out an arrangement of the above description it will usually be found to be convenient to cause the shares to be transferred to the transfer agent of the company as trustee. It is also important to make adequate provision for the voting of the shares and the disposition of dividends thereon while the shares remain undisposed of and the final distribution of any surplus of shares not required to be sold among the shareholders for the time being of the company or as may be deemed advisable.

For reduction of share capital under the Act see the notes to s. 54.

To Give Warehouse Receipts.

To give warehouse receipts.

Appellant in this action claimed 1,100 tons of iron as endorsee of five warehouse receipts given by the

Moisic Iron Co. Two of the receipts were signed by the president and three by the secretary of the company. Defendants pleaded that they were not warehousemen and could not give warehouse receipts, and that their president and secretary had no authority to grant such receipts. Sect. 29.

Held, that the action must be dismissed as there was no evidence that the company were warehousemen, or that the president and secretary were authorized to sign warehouse receipts: *Hearle* v. *Rhind* (1878) 22 L. C. J. 239; 1 L. N. 101 Q. B.

Miscellaneous Cases.

Dividends cannot be declared when the capital would be impaired by so doing. This is *ultra vires* no matter how small the dividend: *Colonial Insurance Company* v. *Smith* (1913) 12 D. L. R. 113.

That the performance of a contract requires the construction of an increased plant does not make it *ultra vires*: *National Malleable, &c., Company* v. *Smith's Falls* (1907) 14 O. L. R. 22.

The power to buy the assets of another company is not taken away by a prohibition against leasing, amalgamating or selling out to any other company: *Corporation of the City of Toronto* v. *Toronto Electric Light* (1905) 10 O. L. R. 621.

It is *ultra vires* to forbid the transfer of paid up shares: *Re Good & Jacob Y. Shantz Son & Co.*, 21 O. L. R. 153; *Re Imperial Starch Company* (1905) 10 O. L. R. 22; *Re Belleville Driving and Athletic Association* (1911) 31 O. L. R. 79 (C. A.); *Canada National Fire, &c., Co.* v. *Hutchings* (1918) 87 L. J. P. C. 106.

A covenant to establish and maintain a railway station is within the corporate powers of a development company "to do any act to increase the value of the property, etc.": *Norquay* v. *G. T. P. Town and Development Co.* (1916) 25 D. L. R. 59.

30. The company shall, at all times, have an office in the city or town in which its chief place of business in Canada is situate, which shall be the legal domicile of the company in Offices, agencies, domicile.

Sect. 30. Canada; and the company may establish such other offices and agencies elsewhere as it deems expedient.

Notice. 2. Notice of the situation of such principal office and of any change therein shall be published in the *Canada Gazette*. 2 E. VII., c. 15, s. 22.

It should be noted that while the section contemplates that the head office and the place where the company's main business in Canada is transacted should be one and the same, this is not necessarily the case. The naming of the office and the publication thereof by the company are decisive and it is not necessary that any part of the company's business in the ordinary sense of the term should be carried on at the place where the head office is situated.

It is to the courts in the province where the company's head office is situated that a petition to wind up the company must be presented: R. S. C. (1906) c. 144, s. 8.

It does not, however, follow that a company may not have more than one place of residence. As a matter of fact it may be licensed to do business in one or more provinces under the extra-provincial corporations acts there in force. In such case the naming of a registered office where service may be made and the appointing of an attorney on whom process may be served are required. It is in each case a question of fact whether the company carries on its business in any given place: *Haggin* v. *Comptoir D'Escompte,* 23 Q. B. D. 521; Buckley, 8th ed., p. 176.

For the purpose of taxation a company may be deemed to be resident in a jurisdiction other than that of the place where its head office is situated: *De Beers Consolidated Mines, Limited* v. *Howe* (1906) A. C. 455, where it was held that for the purpose of the Income Tax Act, 1853, the company was resident in England.

Section 95 of the Act provides that service of process shall be made "at the office of the company in the city or town in which its chief place of business in Canada is situated." See also Section 91, which provides that the books mentioned in Sections 89 and 90

shall be kept "at the head office or chief place of business of the company" without adding the qualifying words "in Canada." Sect. 30.

Apart from the Act it would appear that the domicile of a company is determined by the situation of the office from which the company is controlled and managed, Halsbury, vol. 5, para. 6.

The question arises whether a company may be domiciled outside of the country under the laws of which it is incorporated. See as to this Halsbury, vol. 5, p. 15, note m.

Doubts have arisen as to the validity of resolutions passed at meetings held outside the incorporating state, see *De Beers* v. *Howe* (1905) A. C. 455. For a fuller discussion of this question see the notes to s. 77 dealing with meetings, and see *Re Lands & Homes, &c., Robertson's Case* (1919) 44 D. L. R. 325 (Man. C. A.).

31. Every deed which any person, lawfully empowered in that behalf by the company as its attorney, signs on behalf of the company and seals with his seal, shall be binding on the company and shall have the same effect as if it was under the seal of the company. 2 E. VII., c. 15, s. 23. Acts of attorney binding.

In *Scottish Canadian Canning Co.* v. *Dickie* (1915) 22 D. L. R. 890, it was held that the managing director of a company incorporated under the Imperial Companies (Consolidation) Act, 1908, to whom authority had been given to execute all deeds and instruments which he might think necessary in connection with the company's business, was entitled to lease the company's salmon cannery.

32. Every contract, agreement, engagement or bargain made, and every bill of exchange drawn, accepted or endorsed, and every promissory note and cheque made, drawn or endorsed on behalf of the company, by any agent, officer or servant of the company, in general accordance with his powers as such under the by-laws of the company, shall be binding upon the company. Contracts of agent binding on company.

2. In no case shall it be necessary to have the seal of the company affixed to any such contract, agreement, engagement, bargain, bill of exchange, promissory note or cheque, or to prove Cases where seal not necessary.

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that the same was made, drawn, accepted or endorsed, as the case may be, in pursuance of any by-law or special vote or order.

No individual liability.

3. No person so acting as such agent, officer or servant of the company shall be thereby subjected individually to any liability whatever to any third person. 2 E. VII., c. 15, s. 24.

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(B) Liability for torts. Sect. 32.

History of s. 32. The provisions contained in the above section appeared in substantially the same form in (1902) c. 15, s. 24; R. S. C. (1886) c. 119, s. 76; and (1877) c. 40, s. 66.

Provincial variations. In order to determine the applicability of cases decided under the companies legislation of the various provinces it is necessary to note the variations in the local acts which are as follows:—

(a) The Quebec, New Brunswick and Manitoba Acts follow the phraseology of the Dominion Act. The section appears in the Quebec Act as para. 5997; in the New Brunswick Act as s. 72; in the Manitoba Act as s. 66. In the Manitoba Act the words, "or otherwise" are added after the words "in general accordance with his powers as such under the by-laws."

(b) In Ontario the corresponding section, viz., s. 81 of R. S. O. (1897) c. 191, reproducing s. 78 of 60 Vict. c. 28, appears to have been dropped in 1907, and in the subsequent revisions.

(c) In the Nova Scotia Act, s. 88, c. 128 R. S. N. S. (1900) and amendments, reproduces s. 37 of the Imperial Act of 1867.

(d) The Acts of Saskatchewan, Alberta and British Columbia contain two sections, one incorporating the provisions of the Imperial Act, as in the case of Nova Scotia, and the other section containing a provision similar to the Dominion s. 32, covering contracts by officers and agents, and expressed to be *subject* to the first named section, viz., the section corresponding to the Imperial Act, 1867, s. 37.

The sections in question appear in the Acts of the above named provinces as follows:—Saskatchewan, ss. 107, 108; Alberta, ss. 95, 97; British Columbia, ss. 84, 86.

The provisions of the Imperial Act are found in sub-sections (1) and (2) of section 76 of the Act of 1908, which is a re-enactment of section 37 of the Act of 1867. The latter section reads as follows:—

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"Contracts on behalf of any company under the principal Act may be made as follows (that is to say):

English Act.

(1) Any contract which if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged:

(2) Any contract which if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged:

(3) Any contract which is made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged.

And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors and all parties thereto, their heirs, executors, or administrators, as the case may be."

Under the above section and under the acts of the various provinces which have adopted a similar provision the common law rule as laid down in *South of Ireland Colliery* v. *Waddle* (1869) L. R. 4 C. P. 617, is further extended.

The provisions last quoted are certainly more explicit and are probably wider than the provisions of section 32.

Under section 32 contracts made by the agents, officers or servants of the company "in general accordance" with their powers are binding on the com-

pany, and this provision will be construed broadly and a reasonable latitude allowed in ascertaining the agent's authority. See *Taylor* v. *Cobourg, etc., Co.* (1874) 24 C. P. 200; *Thompson* v. *Brantford, etc., Co.* (1898) 25 A. R. 340; *Clarke* v. *Union Fire Insurance Co.* (1884) 10 P. R. 339; *Bain* v. *Anderson* (1897) 27 O. R. 369, 374; *Imperial Bank* v. *Farmers Trading Co.*, 13 Man. L. R. 412. Sect. 32.

Note on the powers and liabilities of corporations.

(A) Contracts.

(1) Limitations.

(2) The necessity for a corporate seal.

(3) The authority of the officer or agent acting for the company.

A corporation is as fully capable of binding itself by contract as an individual: *Bateman* v. *Ashton-under-Lyne Corporation* (1858) 3 H. & N. 323, per Martin, B., at p. 335; *Ooregum Gold Mining Company* v. *Roper* (1892) A. C. 125. Such capacity is, however, subject to certain necessary limitations.

(1) Limitations.

A contract made on behalf of a company before incorporation is not binding on the company and can not be ratified by it after incorporation: *Kelner* v. *Baxter* (1866-7) L. R. 2 C. P. 174; *Re Empress Engineering Co.* (1881) 16 Ch. D. 125. And the subsequent adoption and confirmation by the company of such a contract does not impose any obligation on the company or establish any contractual relation between it and the other party to the contract: *North Sydney Investment Co.* v. *Higgins* (1899) A. C. 263. Nor will the company be bound in such cases although the parties afterwards carry out some of the terms of the contract and act on the supposition that it was binding on the company: *Coit* v. *Dowling* (1898-1901) 4 Terr. L. R. 464; and see *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (1902) 1 Ch. 146. Pre-incorporation contracts.

In England a provision in the articles of association that the company shall adopt and be bound by

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such a contract, or shall enter into a particular contract still leaves the company free until after its incorporation it binds itself by contract: *Re Northumberland Avenue Hotel Co.* (1886) 33 Ch. D. 16; *Browne* v. *La Trinidad Co.* (1888) 37 Ch. D. 1; *Re Dale and Plant, Ltd.* (1889) 61 L. T. 206.

Conversely, a company can not by adoption or ratification claim the benefit of a contract made on its behalf before incorporation: *Natal Land &c. Co.* v. *Pauline Colliery Syndicate* (1904) A. C. 120.

There is nothing, however, to prevent the company, after incorporation, from entering into a new contract on the terms of the pre-incorporation contract: *Howard* v. *Patent Ivory Mfg. Co.* (1888) 38 Ch. D. 156; *Re Dale and Plant Ltd.* (1889-90) 61 L. T. 206, 207.

If the company merely takes the benefit of a contract made before its incorporation it will not be bound: *Re Rotheram Alum Co.* (1884) 25 Ch. D. 103; *In re English & Colonial Produce Co.* (1906) 2 Ch. 435; *In re National Motor Mail Coach Co.* (1908) 2 Ch. 515.

Subscription for shares before incorporation.

A person who subscribes for shares in a company before incorporation, unless he signs the memorandum of agreement which accompanies the petition, in the absence of other facts whereby he becomes a shareholder, is not liable on his subscription. See the notes to s. 46 where the cases are collected.

Ultra vires contracts.

A contract *ultra vires* the company is wholly void and cannot be enforced or ratified.

Lack of power may arise from various causes, of which the most fundamental is constitutional limitation.

A company can only receive such powers as the State or Province creating it has power to bestow upon it and if the State or Province assumes to confer upon the company greater power than it is able to bestow, the act of the Province or State is itself *ultra vires* and the company does not possess the powers which its charter assumes to confer upon it.

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"Where the incorporating authority itself has only a limited power of incorporation the general words of the charter or memorandum of association must be read subject to that limitation, for the company can possess no greater powers than its creator has power to bestow on it." *Weyburn Townsite Co. Ltd.* v. *Honsberger* (1918) 43 O. L. R. at p. 460; *Bank of Australia* v. *Earl*, 13 Peters at p. 589; *Canadian Pacific Ry.* v. *Western Union*, 17 S. C. R. at p. 163.

The lack of power to contract may be limited by the statute under which the company is incorporated. See *Henderson* v. *Strang* (1918) 43 O. L. R. 617; 45 O. L. R. 215.

The power to contract is limited to objects for which the company is incorporated and matters incidental to or consequential upon such objects: *Ashbury* v. *Riche*, L. R. 7 H. L. 653; *Attorney General* v. *Great Eastern Ry.* L. R. 5 App. Cas. 473; *Williams* v. *Crawford*, 16 O. L. R. 245; unless the corporation is a common law corporation: *Bonanza Creek Gold Mining Co.* v. *The King* (1916) 1 A. C. 566; *Edwards* v. *Blackmore* (1918) 42 O. L. R. 105.

A limitation may also be prescribed by the general by-laws or articles of the company. But a stranger dealing with the company will not be affected by such limitation unless he had notice thereof.

In some cases corporations are by their constitutions required to observe certain formalities when making contracts. In these cases the requirements of the constitution must be strictly carried out: *McKay* v. *City of Toronto* (1917) 39 O. L. R. 34; (1918) 43 O. L. R. 263; (1919) 88 L. J. P. C. 204; *Cope* v. *Thames Haven & Dock Rail Co.* (1849) 3 Exch. 841; *Stevens* v. *Hounslow Burial Board* (1889) 61 L. T. 839; *Eaton* v. *Busker* (1881) 7 Q. B. D. 529.

(2) **As to the necessity for affixing the corporate seal to the contract.**

The original rule of the common law that the contract of a corporation aggregate must be under seal still obtains save in so far as exceptions have been grafted upon it, per Ferguson, J., in *Hill* v. *Ingersoll*

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Road Co. (1900) 32 O. R. p. 202; and see *Bartlett* v. *Town of Amherstburg,* 14 U. C. R. 152; *McLean* v. *Town of Brantford,* 16 U. C. R. 347; *Houck* v. *Town of Whitby,* 14 Grant. 671; *Silsby* v. *Village of Dunnville,* 31 C. P. 301, 8 A. R. 524; 6 Vin. Abr. 267; 1 Wms. Saunders 615, 616; *Oxford Corporation* v. *Crow* (1893) 3 Ch. 535.

Where the governing statute prescribes the affixing of a seal such direction must be observed and no recovery can be had against the corporation in the absence of a seal even though the contract is executed: *McKay* v. *Toronto* (1917) 39 O. L. R. 34; in appeal (1918) 43 O. L. R. 263; (1919) 88 L. J. P. C. 204.

Where a statute provided that all contracts of a company over a certain amount "shall be under seal" it was held that the plaintiff could not recover for work done in pursuance of a contract not under seal although the corporation had the benefit of the work: *Frend* v. *Dennett* (1858) 4 C. B. N. S. 576; *Hunt* v. *Wimbledon Local Board* (1879) 4 C. P. D. 48. But see *Bernardin* v. *Municipality of North Dufferin* (1891) 19 S. C. R. 581 and *King* v. *Beamish* (1916) 30 D. L. R. 116.

Executed contracts not enforced.

School trustees held not liable to pay for a schoolhouse erected for and accepted by them. Macaulay, C. J., *Marshall* v. *School Trustees of Kitley* (1855) 4 C. P. 373.

Executed contract for opening road approved of by township surveyor: *Fetterly* v. *Russell and Cambridge* (1857) 14 U. C. R. 433.

Executed contract between two railways special in its terms, held invalid: *Great Western R. W. Co.* v. *Preston and Berlin R. W. Co.,* 17 U. C. R. 477.

Action against a corporation for work performed at request of ratepayers' committee, dismissed: *Stoneburgh* v. *Brighton* (1859) 8 C. P. 155.

It is a general principle that a corporation can not be bound by anything in the nature of an agreement relating to real property, except under seal, but there are cases where it may be bound by a resolution of

the governing body, even in the case of a sale or purchase of land, as where the corporation has agreed by resolution to purchase and has entered into possession: *Jennett* v. *Sinclair* (1876) 10 N. S. (1 R. & C.) 392. Sect. 32.

Not in every case of an executed consideration will a corporation be bound by a contract irregularly made by some of the directors and not by the board. The Court will look at all the circumstances, and fix the corporation with liability only where it would be flagrantly dishonest in the corporation to resist payment: *Hamilton & Port Dover Ry. Co.* v. *Gore Bank* (1873) 20 Gr. 190.

Where there is part performance the invalidity of an agreement for a lease for want of the corporate seal of the lessee, a municipal corporation, or the absence of seals to the municipal resolution authorizing it, can not be relied upon: *Township of King* v. *Beamish* (1916) 30 D. L. R. 116. But this and the following cases must now be considered as of doubtful validity in view of the decision in *McKay* v. *Toronto, supra.* Part performance.

Other Canadian cases.

Executed contracts not under seal have been enforced in the following cases:

The lessee of a corporation who has had possession not allowed to set up the want of seal: *Municipal Council of Frontenac* v. *Chestnut* (1852) 9 U. C. R. 365, and a corporation may also be sued for use and possession in such a case: *Maynard* v. *Gamble* (1863) 13 C. P. 56. Executed contracts enforced.

Agreement for compensation by mining company to discoverer of a mine: *McDonald* v. *Upper Canada Mining Co.* (1868) 15 Gr. 179.

Agreement enforced to pay solicitor's costs to be incurred by bankers where costs were incurred: *Hamilton & Port Dover R. Co.* v. *Gore Bank* (1873) 20 Gr. 190.

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Work done under building contract altered by parol: *Davis* v. *Grand River Navigation Co.* (1840) 6 U. C. R. (O. S.) 59.

Executed contracts enforced.

Action sustained against corporation for work done for and accepted by them: *Pim* v. *Municipal Council of Ontario* (1860) 9 C. P. 304.

Mechanics' institute liable to architect for preparing plans and superintending the erection of a hall for their accommodation, Draper, J. dissenting: *Clark* v. *Hamilton Mechanics' Institute* (1854) 12 U. C. R. 178.

Engineer employed by chairman of committee of council entitled to recover (1) for plans; (2) for journey to Quebec at request of alderman: *Perry* v. *Ottawa* (1864) 23 U. C. R. 391.

Contractor recovered for road built, though mode of payment agreed on was not authorized by Act of incorporation: *Thornton* v. *Sandwich Street etc. Co.* (1866) 25 U. C. R. 591.

Expense of bringing a dredge to a municipality at its request: *Brown* v. *The Corporation of Belleville* (1870) 30 U. C. R. 373.

Executed contracts for alterations and improvements to court house: *McIntosh* v. *Commissioners, etc., of Halifax* (1888) 20 N. S. R. 430.

Absence of seal must be specially pleaded by the defendant: *Ibid.*

Purchase money received under parol agreement to supply manufactured goods: *Diamond* v. *St. George Lime Co.*, 4 N. B. (2 Kerr.) 537.

Municipal weigh-master recovered arrears of salary up to time of dismissal, but not subsequently: *Dempsey* v. *Toronto* (1849) 6 N. C. Q. B. 1.

A chief engineer of a railway company recovered for arrears of salary: *Forest* v. *Great North-West R. W. Co.* (1899) 12 M. R. 472.

Policies of an insurance company signed by the president and countersigned by the secretary were held valid without the seal of the company being

affixed: *Dimock* v. *N. B. Marine Insurance Co.* (1849) 6 N. B. (1 Al.) 398. Sect. 32.

The setting up of "the want of a seal" as a defence to an action on an insurance policy which had been treated by all parties as a valid policy was said to be a fraud which a Court of Equity could not refuse to interfere to prevent, without ignoring its functions and its duty to prevent and redress all fraud whenever and in whatever shape it appears: *London Life Assurance Co.* v. *Wright* (1880) 5 S. C. R. 466.

In the absence of an express statutory requirement of a contract under seal, wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, and orders are given at a corporate meeting regularly constituted and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done or goods supplied and accepted by the corporation and the whole consideration for payment executed, there is a contract to pay implied from the acts of the corporation, and the corporation cannot keep the goods or the benefit and refuse to pay on the mere ground that the formality of a deed or of affixing the seal was wanting:

Campbell v. *Community &c.* (1910) 20 O. L. R. 467; *Gowans Kent* v. *Assinaboia Club* (1915) 25 D. L. R. 695; *Lawford* v. *Billericay Rural Council* (1903) 1 K. B. 772, C. A. (plans of sewage extension scheme); following *Clarke* v. *Cuckfield Union Guardians* (1852) 21 L. J. (Q. B.) 349 (supply of water closets to workhouse); *Nicholson* v. *Bradfield Union Guardians* (1866) L. R. 1 Q. B. 620 (supply of coals to workhouse) and *Haigh* v. *North Brierley Union Guardians* (1858) E. B. & E. 873 (employment of special auditor to audit accounts of clerks suspected of fraud); *Sanders* v. *St. Neot's Union* (1846) 8 Q. B. 810 (supply of iron gates to workhouse); *De Graves* v. *Monmouth Corporation* (1830) 4 C. & P. 111 (supply of weights and measures); and *Doe d. Pennington* v. *Taniere* (1848) 12 Q. B. 998

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(lease from year to year implied from receipt of rent), and disapproving *Ludlow Corporation* v. *Charlton* (1840) 6 M. & W. 815 (contract to pay for improvements); *Smart* v. *West Ham Union Guardians* (1855) 10 Exch. 867; *Dyte* v. *St. Pancras Guardians* (1872) 27 L. T. 342 (appointment of medical officer).

In the case of a non-trading corporation the corporation will be liable if the contract is executed: *Campbell* v. *Community* (1910) 20 O. L. R. 467; *Gowans Kent* v. *Assinaboia Club* (1915) 25 D. L. R. 695.

In the case of a non-trading company whose constitution contains no provision dispensing with the necessity for a seal the general rule is that the company will be held not liable if the contract is executory.

There is a broad and well marked distinction between contracts executed and contracts executory in the case of incorporated companies whether trading or not, and where a contract is executory a company is not bound unless the contract is made in pursuance of its charter or is under its corporate seal. The defendant company, who had occupied certain premises under a verbal agreement and paid rent for a year continued in possession after the year and then went out, paying rent for the time they were actually in possession. Held, that as there was no lease under seal the company were not liable as tenants from year to year, but only for use and occupation while actually in possession: *Finlay* v. *The Bristol and Exeter R. W. Co.* (1852) 7 Ex. 409, discussed and followed; *Garland Co.* v. *Northumberland Co.* (1900) 31 O. R. 40; doubted in *Young* v. *Bank of Nova Scotia* (1915) 34 O. L. R. 176, 182. But to bind a corporation by an executory contract to purchase for an indefinite and protracted period, would require an agreement under seal: *Hill* v. *Ingersoll &c. Co.* (1900) 32 O. R. 194.

Where a lease under seal exists the consequences of overholding and paying rent are the same for a corporation tenant as for an individual: *Young* v. *Bank of Nova Scotia* (1915) 34 O. L. R. 176, but a ver-

bal lease for a year entered into by the manager of a non-trading corporation not under corporate seal or by-law will not be impliedly renewed by holding over. In such case the company is only liable for use and occupation: *Richardson* v. *Urban Mutual &c., Co.* (1916) 28 D. L. R. 12, 26 Man. L. R. 372, following *Finlay* v. *Bristol* 7 Ex. 409. Sect. 32.

In *Winnipeg Hedge and Wire Fence Co.* (1912) 1 D. L. R. 316, a treasurer's statement enumerated among the assets of the company "patent, $20,000." The statement was adopted by the board. The incorporators acting as a syndicate had been negotiating to transfer the patent to the company. There was no by-law or other document under the company's seal and it was held that the statement of the treasurer and its adoption were insufficient evidence of a contract by the company to take over the patent at $20,000.

Executory Contracts not under seal, were not enforced in the following instances:—

Executory agreement to build an engine for a steamboat: *Hamilton* v. *The Niagara Harbour and Dock Co.* (1842) 6 U. C. R. (O. S.) 381. Executory contracts not enforced.

Contractor entitled to recover the value of work done but not damages sustained from not being allowed to finish the job: *Bartless* v. *Amherstburg* (1856) 14 U. C. R. 152; but see *McLean* v. *Brantford* (1858) 16 U. C. R. 347.

Executory contract for sale of land not enforced against a corporation: *Howk* v. *Town of Whitby* (1868) 14 Gr. 671.

See also *Quinn* v. *School Trustees* (1850) 7 U. C. R. 130, where it was held that an action on the case, founded on a parol agreement with a teacher, against the school trustees for wrongful dismissal, would not lie where the contract was not under seal.

Contract for supply of gas not binding: *Smith* v. *London Gas Co.* (1859) 7 Gr. 112.

Trading company held not liable for refusing to accept barrels ordered by written contract not under

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seal: *Wingate* v. *Enniskillen Oil Refining Co.* (1864) 14 C. P. 379.

Executory agreement by a corporation to purchase fire hose not enforced: *Brown* v. *Lindsay* (1874) 35 U. C. Q. B. 509.

Civil engineer failed to recover against a railway company: *Armstrong* v. *Portage, etc., R. Co.* (1884) 1 M. R. 344. But see *Murdock* v. *Manitoba, etc., R. Co.* (1881) Temp. Wood (Man.) 334.

In the case of companies incorporated under this Act the words of sub-section 2 appear to obviate the necessity for a seal except in cases where it would be necessary for an individual to use a seal.

And even in the case of certain trading corporations to which the section does not apply the defence of absence of the corporate seal can rarely prevail.

The doctrine of the common law was that corporations could bind themselves only under their common seal, except in small matters of daily occurrence, as in the appointment of servants and the like. The principle of these exceptions was in the words of the Court of Exchequer Chamber, "convenience, amounting almost to necessity." The great increase in the importance and variety of corporate undertakings which has taken place in modern times has led to a corresponding increase of the exceptions. And this principle of "convenience amounting almost to necessity" has been extended to cover all contracts which can be fairly regarded as incidental to the objects and powers of the company. Pollock on Contracts, 6th ed., pp. 142, 145, approved in *Thompson* v. *Brantford Electric Co.* (1898), 25 A. R. p. 348.

Ontario Act.

The principles which obtain in our jurisprudence are fully stated in *McKnight* v. *Van Sickler* (1915) 51 S. C. R. 374, and particularly by Mr. Justice Duff at p. 383, where the principle long established in *South of Ireland Co.* v. *Waddell* L. R. 3 C. P. at p. 643, was fully adopted as being the law in Canada.

Contracts in pursuance of charter.

Contracts not under the corporate seal made with trading corporations relating to purposes for

which they are incorporated or apparently formed, and of such a nature as would induce the Court to decree specific performance thereof if made between ordinary individuals will be enforced against them. *Ontario Western Lumber Co.* v. *Citizens' Telephone, etc., Co.* (1896) 32 C. L. J. 237. Sect. 32.

As to what is a trading corporation, see *Richardson* v. *Urban Mutual &c. Co.* (1916) 28 D. L. R. 12; 26 Man. R. 372.

"The defendants are a trading corporation established for carrying on the business for which they are incorporated, and after much conflict it is now very clearly established that a contract of this kind does not require to be under seal."

"A company can only carry on business by agents, managers and others, and if the contracts made by these persons are contracts which relate to objects and purposes of the company and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company though not under seal."

"If it is directly connected with the object of the corporation in carrying on the trade, the magnitude or insignificance of the contract is not an element in deciding cases of this kind. It is clear, therefore, that this was a contract not required to be under seal:" *Thompson* v. *Brantford Electric, etc., Co.*, 25 Ont. A. R. 340.

See also *Holmes* v. *French* (1898) 1 Ir. 319 at p. 333; *Foster* v. *British Colonial Fire Ins. Co.* (1917) 37 D. L. R. 404. It is enough if the contract is in furtherance of the company's objects, *e.g.*, a contract of sale of land with a view to enable the company to purchase other lands for the carrying out of its business: *Van Sickler* v. *McKnight Construction Co.* (1914) 31 O. L. R. 531 at p. 537, (1915) 51 S. C. R. 374. And it has been held that it is incidental to the purpose and objects of a trading company to restore to a working condition an experienced employee injured while in the service of the company and to

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See also *A. E. Thomas Ltd.* v. *Standard Bank* (1909-10) 1 O. W. N. 379; *Trusts & Guarantee* v. *Abbott Mitchell* (1906) 11 O. L. R. 403; *Brandon Construction Co.* v. *Saskatoon School Board* (1912) 5 D. L. R. 754; (1913) 13 D. L. R. 379; *Houghton Land Corporation* v. *Ingham* (1914) 24 Man. R. 497, is possibly to be explained as a decision depending on the provisions of the Manitoba Companies Act, R. S. M. 1913 c. 35.

Executory contracts enforced.

The following executory contracts, though not under seal, were enforced:—

Contract for stone work by Co-operative Stonecutters' Association enforced at the suit of the Association, it being considered a trading corporation: *Ontario Co-operative Stonecutters' Association* v. *Clark* (1880) 31 C. P. 280.

The contract for future sale of cheese by a cheese company enforced: *Albert Cheese Co.* v. *Leaming* (1880) 31 C. P. 272.

Contract of hiring for "the season" enforced by master of a vessel against a railway company: *Ellis* v. *Midland R. Co.* (1882) 7 A. R. 464.

Assumpsit held maintainable on parol agreement for supplying water: *Blue* v. *Gas and Water Co.* (1849) 6 U. C. Q. B. 174.

Enquiry directed as to damages suffered by contractor employed by managing director where prevented by company from completing contract: *Whitehead* v. *Buffalo, etc., R. W. Co.* (1859) 7 Gr. 351; but varied on appeal so far as damages allowed for not being allowed to complete the contract, see 8 Gr. 157.

S. 32 (2)—Form of the contract.

Where a contract is executed under the common seal the following form should be followed: the company is expressed to be one of the parties and the final clause should read: "In witness whereof the company has caused its corporate seal to be hereto affixed, attested by the hands of its proper officers."

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The mere affixing of the corporate seal is sufficient without the signature of the officers; but if the by-laws provide as they usually do that the seal should be affixed by certain officers who shall add their signatures, it would seem that the company would not be bound where the signatures did not appear, as the other party could not maintain that the affixing of the seal was apparently regular. The company will not be bound where the seal has been fraudulently affixed by the secretary: *Ruben* v. *Great Fingall Consolidated Co.* (1906) A. C. 439. See also *Davies* v. *Bolton* (1894) 3 Ch. 678.

Formerly the rule was that the affixing of the corporate seal implied delivery. It would seem, however, that actual delivery is now requisite: *Clarke* v. *Imperial Gas, &c., Co.* (1833) 4 B. & Ad. 315; and the modern law appears to be in harmony with the fact that a company may execute a deed in escrow.

A slight variation in the name of the company in a written contract, *e.g.*, "M. Beatty & Sons Co., Lim.," where the proper name was "M. Beatty & Sons, Limited" will not invalidate the contract: *Schmidt* v. *M. Beatty & Sons, Limited* (1916) 10 O. W. N. 230.

Formalities in appointment of agents.

In *Birney* v. *Toronto Milk Company* (1903) 5 O. L. R. 1, it was held that it was requisite for the valid appointment of a manager that his appointment should be under seal. A time keeper is not such a superior officer that his appointment must be under seal: *Gordon* v. *Toronto, &c., Land Co.* (1885) 2 M. R. 318; see also *Belch* v. *Manitoba* (1887) 4 M. R. 199; *Hughes* v. *Canada Permanent* (1876) 39 U. C. Q. B. 221. Where the company is being sued for remuneration by the agent the question whether he was validly appointed is important; see the above cases. If the agent has performed all the services under the contract whereby he was appointed, the absence of an appointment under seal is not fatal: *Forest* v. *G. N. W. Ry. Co.* (1899) 12 Man. R. 472. See also *McEdwards* v. *Ogilvie* (1887) 4 Man. L. R. 1.

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On the other hand the duty of engaging minor clerks and servants is commonly delegated to one or other of the officers of the company. No formalities are requisite for the appointment of an agent for the performance of ordinary services; he need not be appointed by deed: Halsbury, vol. 1, pp. 155 and 156.

Miscellaneous cases.

Miscellaneous cases.

Where an instrument is produced under seal of the company, the seal must *prima facie* be taken to be properly affixed, but the presumption is rebuttable: *D'Arcy* v. *Tamar Ry. Co.* (1867) L. R. 2 Ex. 158.

The equitable rule of part performance taking the case out of the Statute of Frauds, applies to a company: *Howard* v. *Patent Ivory Co.* (1888) 38 Ch. D. 163.

Where a contract has been entered in the minutes of a company, and the minutes have been signed by the president or chairman, this will be considered a sufficient writing to satisfy section 4 of the Statute of Frauds: *Jones* v. *Victoria Graving Dock Co.* (1877) 2 Q. B. D. 314.

A company is bound by a contract for the purchase of goods where such purchase is *intra vires* even though the seller may have notice that the goods have been purchased for a purpose which is *ultra vires* of the company: *Re Contract Corporation* (1869) L. R. 8 Eq. 14.

Where a person did work for a company, and agreed to accept either shares or cash in payment, it was held, that on a winding-up he could not be compelled by the liquidators to accept shares against his wish: *Re Alexander Park Co.* (1866) W. N. 231.

And one who enters upon and pays rent for corporation property under a demise for a number of years, made on behalf of a corporation, but not sealed with their common seal, becomes tenant from year to year under the corporation, on such terms of the demise as are applicable to yearly tenancies, and the corporation may also distrain for rent: *Wood* v. *Tait*

(1806) 5 B. & P. 247; *Ecclesiastical Commissioners* v. *Merrill* (1869) L. R. 4 Ex. 162. Sect. 32.

As to implied contract of hiring, see *O'Dell* v. *Boston and Nova Scotia Coal Co.* (1897) 29 N. S. R. 385.

As to liability for costs of solicitor, see *Duff* v. *Canada Mutual Fire Ins. Co.* (1882) 9 P. R. 292; 2 O. R. 560.

As to contracts with foreign corporations, see *Canadian Pacific R. W. Co.* v. *Western Union Telegraph Co.* (1889) 17 S. C. R. 151.

As to goods supplied to an inchoate company, see *Seiffert* v. *Irving*, 15 O. R. 173; and services, *O'Dell* v. *Boston and Nova Scotia Coal Co.* (1897) 29 N. S. R. 385.

As to bills of exchange and promissory notes, see *Bryant* v. *Banque du Peuple, Bryant* v. *Quebec Bank* [1893] A. C. 170; *Fairchild* v. *Ferguson* (1892) 21 S. C. R. 484; and *Bridgewater Cheese Factory Co.* v. *Murphy* (1894) 26 O. R. 327; 23 A. R. 66.

As to the right to prove a claim for taxes against an incorporated company in liquidation, and also uncollected water rates, see *Re Ottawa Porcelain Co.* (1900) 31 O. R. 679.

(3) Of the authority of the agent or officer who assumes to make the contract for the company.

Agency in general.

Every company has an implied power to act through its agents, since being an artificial person it "can not act in its own person, for it has no person": *Ferguson* v. *Wilson* (1866) 2 Ch. 77, 89.

Sub-section 1 of Section 32 relates only to the power conferred by the by-laws on the agent, officer or servant, but cases frequently arise where, though the agent, officer or servant is validly appointed, yet the powers of such an agent, officer or servant are not expressed in any by-law, and the aid of this section cannot in consequence be invoked—but the authority of an officer or agent may be implied from various circumstances and the company will be bound by his acts notwithstanding that no authority was in fact conferred or that it has been exceeded.

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The authority of any agent, officer or servant is always a question of fact and consequently the reported decisions are numerous and not always reconcilable.

Directors, general agents.

The general agents of the company are the directors, to whom the management of the company's affairs is entrusted; and the board acting as such will as a general rule have power to bind the company by any arrangement or contract. See the notes to s. 80 for a discussion of the powers of directors. A single director not specially authorized has no power to bind the company: *Bent* v. *Arrowhead* (1909) 18 Man. L. R. 633; *Swayze* v. *Grobb* (1915) 8 O. W. N. 316 (a case of an agreement with a single director for the allotment of stock).

But not the only agents.

While the directors are invested with the management of the company, they may and commonly do delegate the performance of many acts to officers, clerks and servants of the company, who to the extent of the agency expressly or impliedly delegated are the agents of the company and are entitled to bind it by their acts. See s. 80 (d). The matter is well put in *Thompson* v. *Brantford Electric, &c., Co.* (1898) 25 A. R. 340, at p. 345.

"The directors of a company are not, however, necessarily its only agents. It is generally necessary for them to employ other persons to act for the company, and where this is the case those persons will also have power to bind the company within the limits of their agency, and as a rule their authority cannot be denied, unless their employment was beyond the power of the directors, or they had been employed irregularly, and the person dealing with them had notice of the irregularity."

Practical suggestions.

Where the authority of the officer or agent is doubtful, or in transactions of any magnitude, it is always advisable to insist on the production of a properly certified copy of a resolution of the board of directors authorizing the specific contract or transaction proposed to be entered into on the company's behalf.

Authority of agent.

The authority of the agent or officer may be conferred by the by-laws, and, if in purporting to bind the

company, he is acting squarely within his authority thereunder, the section applies and the company will be bound, subject to the following qualification. If there is anything in the governing act or in the charter limiting the authority of the company or of its agent or officer, a person dealing with him being affected with notice thereof does so at his peril: *Thompson* v. *Brantford Electric, &c., Co.* (1898) 25 A. R. 340, 346. Sect. 32.

Where relying on this section it is sought to make a company liable on a contract entered into by an officer or agent, proof should be given as to the by-laws or other means of enabling him to create a binding engagement: *Williams* v. *Crawford Tug Co.* (1908) 16 O. L. R. 245, per Boyd, C., at p. 248. In one case the court found as a fact that a contract was entered into by an officer in general accordance with his powers under the by-laws where nothing appeared in evidence to lead to the contrary conclusion: *Bain* v. *Anderson* (1897) 27 O. R. 369, 374.

The following cases indicate the leading principles to be applied:

Biggerstaff v. *Rowatt's Wharf* (1896) 2 Ch. 93.

In that case question arose as to the validity of certain assignments of book debts by a managing director.

The defendant company gave a series of orders on the debtors of the company, Harvey, Brand Co. These assignments or hypothecations of book debts were signed on behalf of the company by one Davy as managing director. Lord Justice Kay in his judgment, says at p. 106:

"Whether Mr. Davy had been formally appointed managing director does not signify; he acted and was recognized as such. By the articles the directors were authorized to delegate to him all their powers except the drawing, indorsing and accepting bills of exchange and promissory notes."

At page 103 Lord Justice Lopes says:

"The question as to the hypothecation of debts is quite distinct. It is said that the managing director

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had no power to hypothecate them. There is no doubt Mr. Davy was the managing director and acted as such, and according to the articles the directors could have given him the power which he purported to exercise. There is an absence of evidence that they had done so; but is that enough to make his acts void? In Lindley on Companies, 5th ed., p. 159, the law is thus laid down: 'Upon principle, therefore, where persons are in fact employed by directors to transact business for a company the authority of those persons to bind a company within the scope of their employment cannot be denied by the company, unless—(1) their employment was altogether beyond the powers of the directors; or unless, (2), the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity. Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bona fide* and without notice of the irregularity in his appointment. The following cases are important on this point. In *Smith* v. *Hull Glass Company,* 8 C. B. 668; 11 C. B. 897, it was held that a company registered under 7 & 8 Vict. c. 110, was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorized by the directors to order the goods in question. Maule, J., went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bona fide* with such persons have a right to assume that they have been duly appointed. This view is in accordance with later authorities.' ''

Every word of that applies here.

National Malleable Castings Co. v. *Smith's Falls Malleable Castings Co.*, 14 O. L. R., at p. 28.

The plaintiffs sued on an agreement to furnish the plaintiffs malleable iron coupler parts as ordered from

time to time. The order was accepted by the managing director without any specified authority from the directors of the company, and there was no formal subsequent approval or disapproval by the board of what had been done. It was contended that the agreement did not bind the company. Sect. 32.

At p. 28 Garrow, J.A., says:

"Apart from the other objections, the contract is in its nature one which *prima facie* the board of directors might lawfully enter into. It is, although extensive and important, after all, only one to manufacture and supply articles of the kind for the manufacture and sale of which the defendants were expressly organized, namely, malleable iron castings. And that being so, the board of directors would certainly, I think, have had power to bind the company by entering into such an agreement. And if the board could lawfully have done so, they could also, I think, have authorized the manager to do so for the company. And in the total absence of bad faith or notice, the plaintiffs were entitled to assume that he had been duly clothed with the real authority which he was ostensibly exercising in entering into the contract in question. See R. S. O., 1897, ch. 191, secs. 46, 47, 81; *Thompson* v. *Brantford Electric and Operating Co.*, 25 A. R. 340; *Royal British Bank* v. *Turquand* (1855-6) 5 E. & B. 248, 6 E. & B. 327."

In *McKnight Construction Co.* v. *Vansickler* (1915) 51 S. C. R., at p. 382, Mr. Justice Duff says:

"The first point is as to the authority of the secretary-treasurer. This point, although apparently taken in the Court of Appeal, was not taken in the appellant's factum and was, I think, advanced during the oral argument here on the invitation of the Bench. I am not surprised at this because on examining the record, there appears to be ample evidence that the secretary-treasurer was the apparent agent of the company for the transaction of the kind of business he undertook to do. That being so, the case is within the prin-

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ciple very satisfactorily stated in Palmer's Company Law, 9th ed., 1911, p. 44, in the following words:

" 'This rule is that where a company is regulated by an Act of Parliament, general or special, or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith; but they are not bound to do more; they need not inquire into the regularity of the internal proceedings—what Lord Hatherley called 'the indoor management.' They are entitled to assume that all is being done regularly. See also *Mahony* v. *East Holyford Mining Co.,* L. R. 7 H. L. 869; *Bargate* v. *Shortridge,* 5 H. L. Cas. 297, at p. 318; *In re Land Credit Co. of Ireland,* 4 Ch. App. 460; *In re County Life Assurance Co.,* 5 Ch. App. 288; *Premier Industrial Bank* v. *Carlton Manufacturing Co.* (1909) 1 K. B. 106, is not easily reconcilable with the rule.

" 'This rule is based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed.' "

And at p. 387 Mr. Justice Anglin says:

"For any lack of formality in the steps leading to the authorization of Douglas, the plaintiffs should not suffer. They were not called upon to ascertain that proper steps had been taken to clothe him with authority to execute the contract with them on behalf of the company. They acted with perfect good faith. The power which Douglas purported to exercise was such as, under the constitution of the company, he might possess, and that is enough for a person dealing with him *bona fide*: *Biggerstaff* v. *Rowatt's Wharf* (1896) 2 Ch. 93, at p. 102; *Premier Industrial Bank* v. *Carlton Manufacturing Co.* (1909) 1 K. B. 106, at pp. 113-14. On the evidence I incline to think that the proper inference is that Douglas was in fact clothed with authority to bind the company by an agreement such

as he made; but, if not, it is clear that under the statutory powers of the directors and the by-laws of the company provision was made for vesting such authority in an officer holding his position, and as against third parties dealing with such an officer in good faith in regard to a matter in respect of which the authority could be so conferred upon him, the company cannot be heard to deny his power to bind it. *Totterdell* v. *Fareham Blue Brick and Tile Co.*, L. R. 1 C. P. 674." Sect. 32.

In *Canadian General Securities Co.* v. *George* (1918) 42 O. L. R. 560, the action was for recovery of the purchase price of vacant lots. The defendant set up an agreement by a sales agent of the plaintiff company to resell the lots for him within a limited time at a certain advance. At p. 569 Riddell, J., delivering the judgment of the Appellate Division, says:

"It is, however, objected that there was no authority in George to make such a contract; but that is answered by Clancy's ratification. Clancy being made general manager to sell the plaintiff's land, the secret restriction of his authority (if there was such) would not affect the defendant who relied upon Clancy being the general manager: *McKnight Construction Co.* v. *Vansickler*, 51 S. C. R. 374, 24 D. L. R. 298; *Vansickler* v. *Knight Construction Co.* (1914) 31 O. L. R. 531, 19 D. L. R. 505; *Clarke* v. *Latham*, 25 D. L. R. 751, and cases cited. It is impossible, I think, to hold that the general manager of a company has not the power to make such a contract for his company as is here disclosed."

Agents de facto.

It is not necessary for a person contracting with a company to satisfy himself that the officer or agent purporting to act for it has been duly appointed. The appointment may have been irregular, or the company by acquiescence in the unauthorized acts of the agent may have held him out as having authority to bind it to the obligation in question. In such cases acts by the agent within the scope of his apparent authority will bind the company, provided the other party to the contract had no notice of the defective appointment or the

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limitations of the agent's authority: *Mahoney* v. *East Holyford Mining Co.* (1875) L. R. 7 H. L. 869. In this case the articles of association provided that cheques were to be signed and countersigned as might be directed by the board. Cheques were honored by the bankers of the company purporting to be signed by two of the directors and countersigned by the secretary, though, as a matter of fact, no directors had ever been elected, nor was any resolution ever passed in reference to the signing of cheques. It was held by the House of Lords that the bank need not inquire whether the persons pretending to sign as directors had been duly appointed to office.

Lord Hatherley said at p. 894: "When there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts are rightly done, when those external acts purport to be performed in the mode in which they ought to be performed. For instance when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function, and have properly performed the function for which they have been appointed. Of course the case is open to any observation arising from gross negligence or fraud." See also *Re County Life Assurance Co.* (1870) L. R. 5 Ch. 293; *Thompson* v. *Brantford Electric, &c., Co.* (1898) 25 A. R. 340, 345; *McKnight Construction Co.* v. *Vansickler* (1915) 51 S. C. R. 374.

Course of dealing.

Where the company has by its course of dealing held out an officer or agent as having authority it will be bound by his acts within such apparent authority. Thus in *Imperial Bank* v. *Farmers' Trading Co.* (1901) 13 Man. L. R. 412, although there was no

by-law, resolution or other act defining the powers of the managing director, but the company had frequently given promissory notes which had been paid by the company's cheques, it was held that the note sued upon had been made in general accordance with the powers of the managing director and was binding on the company. Sect. 32.

Holding out and acquiescence.

If the company has permitted its agent to act in a certain capacity without objection and his acts of agency have been acquiesced in by the company, the latter may be liable on the principle of holding out: *Central Canada Railway Co.* v. *Murray* (1882) 8 S. C. R. 314; *Hamilton, &c., Ry. Co.* v. *Gorebank* (1873) 20 Gr. 190; *Wilson* v. *West Hartlepool, &c., Co.* (1864) 34 Beav. 187; *Sheppard* v. *Bonanza Nickel Co.* (1894) 25 O. R. 305. See *Muldowan* v. *German Canadian Land Co.* (1909) 19 Man. L. R. 667, at p. 672; *Brandon Construction Co.* v. *Saskatchewan School Board* (1912) 5 D. L. R. 754, reversed on other grounds (1913) 13 D. L. R. 379; *Acton Tanning Co.* v. *Toronto Suburban Ry.* (1918) 56 S. C. R. 196.

Ostensible authority.

The company may also be liable on the principle of estoppel for acts done by an agent within his apparent authority. If a contract is executed by an officer to whom the necessary authority might have been given it is not incumbent on the other contracting party to ascertain whether he has been regularly clothed with the requisite authority: *McKnight Construction Co.* v. *Vansickler* (1915) 51 S. C. R. 374; 24 D. L. R. 298, where the authorities are collected. See also *National Malleable, &c., Co.* v. *Smith's Falls* (1907) 14 D. L. R. 22; *Foley* v. *Barber* (1909) 1 O. W. N. 40; *Doctor* v. *Peoples Trust Co.* (1914) 16 D. L. R. 192; *Vancouver Engineering Works* v. *Columbia, &c., Co.* (1914) 16 D. L. R. 841; *Acton Tanning Co.* v. *Toronto Suburban Ry. Co.* (1918) 56 S. C. R. 196. And a secret restriction of the agent's authority will not affect the person dealing with him: *Canadian General Securities* v. *George* (1918) 42 O. L. R. 560, 570. A

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company may furthermore estop itself from denying the authority of an officer, *e.g.*, if it has obtained advances on the strength of a note endorsed by him: *C. B. C.* v. *Bellamy* (1916) 25 D. L. R. 133.

Agent apparently acting within authority.

The company will also be bound on the principle of estoppel where the agent is apparently exercising an authority which he in fact possesses: *Ward* v. *Montreal Storage, &c., Freezing Co.* (1904) 26 Que. S. C. 310. In such cases the apparent authority is held to be the real authority: *Bryant Powis* v. *Quebec Bank* (1893) A. C. 170; *MacKenzie* v. *Monarch Life* (1911) 45 S. C. R. 232, but see same case in Privy Council (1913) 15 D. L. R. 695.

When the charter of a corporation does not provide for the exercise of its powers otherwise than in giving the right to make by-laws for the government of the institution and of the officers and servants belonging thereto and no such by-laws are made, the persons who are admitted to have *de facto* and by common consent acted as a governing committee of the body, will be held to be its duly authorized agents whose acts within the limits of the charter are binding upon it: *Hôpital du Sacré Cœur* v. *Lefebvre,* 17 Q. L. R. 35.

See also *Gowans Kent* v. *Assiniboia Club* (1916) 25 D. L. R. 695.

Principle excluded.

The above principle is excluded by notice of the lack of authority of the agent: *Dickson Co. of Peterborough* v. *Graham* (1913) 9 D. L. R. 813; *Union Bank* v. *Eureka Woollen Mfg. Co.,* 33 N. S. R. 302; likewise where there is no authorization and the agreement is not in the ordinary course of the company's business: *Sinclair* v. *Toronto Brick Co.* (1916) 10 O. W. N. 250; *Bird* v. *Hussey Ferrier* (1913) 5 O. W. N. 60.

If the company, however, has neither appointed an agent at all, nor held out anyone as agent, it can not be made liable: *Bent* v. *Arrowhead* (1909) 18 Man. L. R. 632.

As to the authority of particular officers the following cases may be referred to:

Officers. Sect. 32.

Manager and managing director.

It is usual for a company to appoint a manager or managing director with more or less wide powers over the management of the company's affairs. It is not *ultra vires* of a company to give the general manager power over "all the administration of the business of the company subject only to such direction and control as it is the duty of the directors to exercise": *Montreal Public Service Corporation* v. *Champagne* (1917) 33 D. L. R. 49. The manager may or may not also be a director. In his capacity as a director he would have no power individually to bind the company since the directors' authority is vested in them as a body. The extent of the manager's authority is governed primarily by the by-laws, but the company may become liable for his acts on one or more of the principles above discussed; and the company will not necessarily escape liability even though there are no by-laws conferring authority on its officers or agents: *National Malleable, &c., Co.* v. *Smith's Falls* (1907) 14 O. L. R. 22.

See the following cases on the authority of the manager: *Thompson* v. *Brantford Electric, &c., Co.* (1898) 25 A. R. 340; *Ontario Western Lumber Co.* v. *Citizens' Telephone Co.* (1896) 32 C. L. J. 237; *Bain* v. *Anderson* (1896) 27 O. R. 369, 374; *Foley* v. *Barber* (1909) 1 O. W. N. 40; *Doctor* v. *People's Trust Co.* (1914) 16 D. L. R. 192; *Foster* v. *B. C. Colonial Fire Insurance Co.* (1917) 37 D. L. R. 404; *Canadian General Securities, Ltd.* v. *George* (1918) 42 O. L. R. 560; *Dickson Co. of Peterborough* v. *Graham* (1913) 9 D. L. R. 813; *Sinclair* v. *Toronto Brick Co.* (1916) 10 O. W. N. 250; *Joshua Calloway* v. *Stobart* (1905) 35 S. C. R. 301; *Brandon Construction Co.* v. *Saskatchewan School Board* (1912) 5 D. L. R. 754; (1913) 13 D. L. R. 379; *In re Farmers Loan and Savings Co.* (1901) 21 Occ. N. 383; *Picard* v. *Revelstoke Sawmill Co.* (1913) 9 D. L. R. 580, 12 D. L. R. 685; *Ledwell* v. *Charlottetown Light and Power Co.* (1915) 13 E. L. R. 225;

Sect. 32. *McGee* v. *Rosetown Electric* (1917-8) 11 Sask. R. 68, 71; *Hedican* v. *Crow's Nest Pass, &c., Co.* (1914) 17 D. L. R. 164.

President. The president of a company has no more power by virtue of his office than an ordinary director of the company, but under the by-laws extensive powers are usually conferred. See *Almon* v. *Law* (1894) 26 N. S. 340; *North West Transportation Co.* v. *Beatty* (1887) 12 App. Cas. 589; *Bridgewater Cheese Factory Co.* v. *Murphy* (1896) 26 S. C. R. 443; *Neelon* v. *Town of Thorold* (1893) 22 S. C. R. 390; *Young* v. *Consumers' Cordage Co.* (1896) 9 Que. S. C. 471; *Schmidt* v. *M. Beatty & Sons, Ltd.* (1916) 10 O. W. N. 230.

Parties dealing with the president of a company are bound to take notice that they are dealing with a person having a limited authority, and they are bound by the limitation of authority contained in the charter of the company: *Balfour* v. *Ernest* (1859) 5 C. B. N. S. 624.

And the company is equally bound, although the president may not have been elected regularly, if there is a "holding out" to the public that he is president, or if he is "president *de facto*": *Almon* v. *Law, supra.*

Where the directors of a company have power to borrow money and mortgage, the president and managing director are by virtue of their office *prima facie* the proper officers to execute mortgages; and a mortgage so signed and sealed with the company's seal is properly executed: *Canadian Bank of Commerce* v. *Smith* (1911) 17 W. L. R. 135.

See also *Tanguay* v. *Royal Paper Mills* (1907) Que. 31 S. C. 397; *Beaucage* v. *Winnipeg Stone Co.* (1910) 14 W. L. R. 575.

The president without the express delegation of authority by resolution of the board may institute and prosecute actions for the company and appoint an attorney *ad litem*: *Standard Trust Co.* v. *South Shore Ry.* (1902-3) 5 Que. P. R. 257.

Where the president has ostensible authority to bind the company and there is no notice of any limitation thereof, a verbal contract made by such officer and

acquiesced in by the company for a number of years will not be set aside: *Acton Tanning Co.* v. *Tronto Suburban Ry. Co.* (1918) 56 S. C. R. 196. Sect. 32.

See also *Thomas, Ltd.* v. *Standard Bank* (1909-10) 1 O. W. N. 548.

It is customary in the case of large companies to have one or more vice-presidents, sometimes with purely nominal or formal duties and powers, although frequently the vice-president is authorized to act in the absence of the president and to exercise some of the functions of the latter. The vice-president when acting within his powers can bind the company: *Whaley* v. *O'Grady* (1912) 22 Man. L. R. 379. See also *Ward* v. *Montreal Storage and Freezing Co.* (1904) Que. 26 S. C. 310. Vice-president.

The secretary acting as agent of the company within the scope of his employment may bind the company by his acts, and the company will be liable whether he is acting for its benefit or not: *Lloyd* v. *Grace Smith & Co.* (1912) W. N. 213. See also *Hambro* v. *Burnand* (1904) 2 K. B. 10; *Bryant Powis* v. *Quebec Bank* (1893) A. C. 170. Forgery by the secretary seems to depend on a different rule; see *Ruben* v. *Great Fingall* (1906) A. C. 439, where a company was held not bound by a share certificate to which the seal of the company had been affixed, the secretary having forged the signature of the directors. So also a company may repudiate a cheque on which the signatures of the directors have been forged by the secretary: *Keptigalla Rubber Estates* v. *National Bank of India* (1909) 2 K. B. 1010. Secretary.

The secretary has no power without authorization to call a meeting: *Re Haycroft, &c., Co.* (1900) 2 Ch. 230; nor to sign a guarantee in the name of the company: *Williams* v. *Crawford Tug Co.* (1908) 16 O. L. R. 245; nor to pass transfers of shares not fully paid up: *Chida Mines, Ltd.* (1905-6) 22 T. L. R. 27.

In *Van Sickler* v. *McKnight Construction Co.* (1914) 31 O. L. R. 531; (1915) 51 S. C. R. 374, the signa-

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ture of the secretary-treasurer to a contract in which the president concurred, but being absent did not sign, was held binding on the company, it appearing further that the secretary-treasurer was authorized to enter into a contract of the kind in question by the general course of business adopted by the company.

See also *Hamilton and Port Dover Ry.* v. *Gorebank*, 20 Gr. 190; *Barnett* v. *South London Tramways* (1887) 18 Q. B. D. 815.

Personal liability of agent.

Personal liability of agent.

Independently of s. 32 (3) an agent acting for a principal incurs no personal liability. The act is the act of the principal who is entitled to any benefit and must meet any liability resulting from such act. Where something is done by an agent or servant "in general accordance with his powers as such under the by-laws of the company," s. 32 itself affords a protection. The agent will be personally liable if:

(a) his authority is defective or non-existent, or

(b) if, through failing to make it clear that he contracted as agent, he is held to have contracted as principal or the personal liability of the agent was contemplated by the parties. Where an agent contracts without authorization he is liable to a third person not aware of the defect of authority as on an implied warranty of authority: *Collen* v. *Wright* (1857) 8 E. & B. 647; *Coit* v. *Dowling* (1898-1901) 4 Terr. L. R. 464.

So if a person enters into a contract on behalf of a non-existing company, he will be personally liable on an implied warranty of authority: *Coit* v. *Dowling* (1898-1901) 4 Terr. L. R. 464.

In *Vulcan Iron Works* v. *Leary* (1905) 1 W. L. R. 453, a manager was held personally liable under the following circumstances:—One G. L., ordered goods signing his own name to a letter headed "Bayne Valley Brick Works, Geo. Leary, Manager." The company was not in existence and the manager was debited with the goods sold and credited with the payments made, although cheques in payment were all signed "Geo. Leary, Manager Bayne Valley Brick Works."

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An officer or agent may become personally liable on a contract if he has entered into it on his own behalf, even though the agreement is signed in the name of the company only. In *Wood* v. *Grand Valley* (1912) 27 O. L. R. 556, (1915) 51 S. C. R. 283, the president of the company signed an agreement "on his own behalf" signing the name of the company over his own name followed by the word "Prest." It was held that the obligation stated to have been assumed by the officer could not be void because he did not sign a second time in his individual capacity.

If on the other hand the liability of the company was contemplated it will be the company and not the officer who will be liable even though the signature may be somewhat ambiguous: *Johnston* v. *Hamilton,* 13 U. C. R. 211, where the defendant who was president of the Victoria Bridge Company signed the agreement in question describing himself as "Pres. V. B."

Bills, notes and cheques.

The most frequent instances of personal liability arising from failure to make it clear that the agent was contracting as such, and any personal responsibility was intended to be excluded, are found in the case of promissory notes signed by an officer or agent of a company.

Where parties "describe themselves as directors or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing, if they have merely described themselves as directors, but do not state that they are acting on behalf of the company,—they are individually liable:" *Dutton* v. *Marsh* (1871) L. R. 6 Q. B. 361 per Cockburn, C. J., at p. 364. If on the other hand they state that they are acting on behalf of the company they are not liable.

The word "we" instead of "I," used in a promissory note signed by an officer in his individual capacity, does not necessarily imply that the note was that of the company: *Lindsay-Walker* v. *Wilson* (1916) 27 D. L. R. 233. Extrinsic evidence is not

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admissible to show that a promissory note signed by a managing director in his individual capacity was intended to be that of the corporation, *ibid.* See also *Wilton* v. *Manitoba &c. Oil Co.* (1915) 25 D. L. R. 243; *Crane* v. *Lavoie* (1912) 4 D. L. R. 175; *Fairchild* v. *Ferguson* (1893) 21 S. C. R. 484.

In an action on a promissory note signed by a company and several individuals the question at issue was whether the note was that of the company only, or whether the individual signers of it were also liable. The note was in form, "we promise to pay" and signed "The Alberta Brick Company, Ltd.—W. C. Harris, Dir. Wm. M. Cross Mgr., F. C. Everard." It was held that there was nothing upon the face of the note to indicate that the individual signers of it were not personally liable: *Union Bank of Canada* v. *Cross* (1912) 5 A. L. R. 489.

In *Bank of Montreal* v. *DeLatre* (1848) 5 U. C. Q. B. 362, the president of the company accepted a bill thus, "P. C. DeLatre, President N. H. & D. Co." In an action by the payee against the acceptor personally he was held to be liable and the addition of his description did not aid him. See also *Armour* v. *Gates* (1859) 8 U. C. C. P. 548; *Laing* v. *Taylor* (1876) 26 U. C. C. P. 416; *City Bank* v. *Cheney* (1857) 15 U. C. Q. B. 400; and Maclaren, Bills Notes and Cheques, ed. 4, p. 158; Falconbridge, Banking, ed. 2, p. 565.

These sections do not confer power to execute bills and notes or to borrow by means of them, but simply point out how the power is to be exercised when it has been conferred on the company: *Re Peruvian Railways Co.* (1867) L. R. 2 Ch. 617, where it was said that s. 47 of the Imperial Act of 1862, which is somewhat similar to the above section, does not confer a power of issuing negotiable instruments, but that such a power exists only where upon a fair construction of the memorandum and articles of association, it appears that it was as intended to be conferred.

Ratification.

Unauthorized acts of agents may be ratified by the company, either expressly or impliedly. Thus

where the agent of the mercantile company purchased property for the company and gave the company's note in payment and the company received notice that it had been given and took steps to repudiate it and subsequently entered into possession of the land, it was held that they had ratified the act of their agent and were bound by the note: *Ryan* v. *Terminal City Co.* (1893) 25 N. S. 131. See further the notes to s. 80. Sect. 32.

(B) Liability for Torts.

A company is liable for the acts of its agents and for the natural consequences of those acts when done by them in the ordinary course of the company's business. Hence, as a result of its agent's wrong, a corporation may be held liable for negligence: *Mersey Dock Trustees* v. *Gibb* (1865) L. R. 1 H. L. 93; *Parnaby* v. *Lancaster Canal* (1839) 11 A. & E. 223; for trespass, *Maund* v. *Monmouthshire Canal* (1842) 4 M. & G. 452; for malicious prosecution, *Abrath* v. *N. E. Ry. Co.* (1886) 11 App. Cas. 247; *Edwards* v. *Midland Rail Co.* (1880) 6 Q. B. D. 287; for libel, *Whitfield* v. *S. E. Ry. Co.* (1858) E. B. & E. 122; *Carroll* v. *Penberthy Injector Co.* (1889) 16 A. R. 446; *Tench* v. *G. W. R. Co.* (1872) 32 U. C. R. 452; *Freeborn* v *Singer Sewing Machine Co.* (1885) 2 M. R. 253; *L'Institut Canadien* v. *Le Nouveau Monde* (1873) 17 L. C. J. 296; for assault and battery, *Butler* v. *Manchester Ry. Co.* (1888) 21 Q. B. D. 207; for nuisance, *Rapier* v. *London Tramways Co.* (1893) 69 L. T. 361; for fraud, *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Ex. 259; *Houldsworth* v. *City of Glasgow Bank* (1880) 5 App. Cas. 317; *Mackay* v. *Commercial Bank of New Brunswick* (1874) L. R. 5 P. C. 394; *Moore* v. *Ontario Investment Association* (1888) 16 O. R. 269. It may be indicted or fined for breach of duty imposed by the law: *R.* v. *Birmingham Ry. Co.* (1842) 3 Q. B. 223; *R.* v. *Tyler & Co.*, [1891] 2 Q. B. 588. It may be estopped by the acts of its agents: *Burkinshaw* v. *Nichols* (1878) 3 App. Cas. 1004; *Bloomenthal* v. *Ford* [1897] A. C. 156. And finally it may be held guilty of laches Agency in general.

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and bound by acquiescence: *Erlanger* v. *New Sombrero* (1878) 3 App. Cas. 1218; *Nicol's Case* (1885) 29 Ch. D. 421. For although it may not have eyes and see what is going on it has agents who can see: *Crook* v. *Corporation of Seaford* (1871) L. R. 6 Ch. 551.

A company on the ordinary principles of the law of agency is answerable for the manner in which its agent has conducted himself in transacting the business which he was authorized to do, and if a sales agent sells stock and represents that his principal has power to repurchase it and will repurchase it, which the principal, an incorporated company, has no power to do, the principal will be bound to refund the money paid: *Whaley* v. *O'Grady* (1912) 4 D. L. R. 485.

Notice.

The doctrine of notice extends to companies, and notice to an agent will be notice to a company whether the knowledge of the agent was acquired in the course of his employment or in any other manner: *Dresser* v. *Norwood* (1864) 17 C. B. N. S. 466; *Ryan* v. *Terminal City Co.* (1893) 25 N. S. 131.

Name with word 'limited' required to be used in certain ways.

33. The company shall keep its name, with the word *limited* after the name, painted or affixed, in letters easily legible, in a conspicuous position on the outside of every office or place in which the business of the company is carried on, and shall have its name, with the said word after it, engraven in legible characters, on its seal, and shall have its name, with the said word after it in legible characters, mentioned in all notices, advertisements and other official publications of the company and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices and receipts of the company. 2 E. VII., c. 15, s. 25.

The penalty which is imposed by section 114 of the Act for failure to keep the name of the company followed by the word "limited" affixed as required by Section 33 is $20 per day during such default, payable by the company and also by every director and manager knowingly or wilfully permitting or authorizing such default.

Section 115 provides that directors, managers or officers of the company or any other person acting on

its behalf responsible for the infraction of the remaining provisions of the section shall incur a penalty of $200. Such persons also incur a personal liability to the holder of a bill of exchange, promissory note, cheque, or order for money or goods, where section 33 has not been complied with, unless the company duly meets its liability thereunder. Sect. 33.

So if the word " limited " is omitted from a bill of exchange the officer signing it will be personally liable: *Penrose* v. *Martyr* (1858) E. B. E. 499.

In *Atkin & Co.* v. *Wardle* (1889) 61 L. T. 23, Denman, J., said at page 26 with reference to the similar sections 41 and 42 of the Imperial Companies Act, 1862, " The intention of the Act was to ensure extreme strictness in all the transactions of limited companies as regards use of the registered name of the company not only in enforcing the use of the word ' limited ' but in all other respects. Cases may easily be conceived in which a very slight variation from the registered name might lead a person to believe that he was taking a bill of a totally different kind of company from that to which the directors signing the bill really belonged."

If there is an addition to the proper title of the company that is not a compliance with the section: *Nassau Steam Press* v. *Tyler* (1894) 70 L. T. 376. But where a bill of exchange was drawn on a company in its proper name but the acceptance thereof omitted the word "limited" it was held that the name of the company was " mentioned " in accordance with the statute and that the directors who signed the bill were not personally liable. It was not necessary that the name should appear correctly both in the bill and in the acceptance: *Dermantine Co.* v. *Ashworth* (1905) 21 T. L. R. 510. This case was followed in *F. Stacey & Co. Limited* v. *Wallis* (1912) 105 L. T. 544, in which it was further held that the abbreviation " Ltd " was, though " L " or "Li " possibly might not be, a compliance with the requirements of Section 63 of the Imperial Companies (Consolidation) Act, 1908. It cannot be confidently stated that the last

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mentioned case, as regards the use of the abbreviation, would be applicable here, owing to the fact that the Dominion Act, unlike the Imperial Act, expressly states that the word "limited" shall appear after the name of the company. At all events in *Howell Lithographic Company* v. *Brethouer* (1899) 30 O. R. 204, the use of the abbreviation "Ltd." was held to be not a compliance with 52 Vict. c. 26 s. 2 (Ontario) which provides "that directors shall be jointly and severally liable upon every written contract or undertaking of the company, on the face whereof the word 'limited' or the words 'limited liability' are not distinctly written or printed. . . ."

On the other hand so far as the liability of the company itself is concerned on documents to which the Company is a party such liability is not avoided by the use of the abbreviation "Ltd." although the statute requires the word to be written in full: *A. E. Thomas, Limited* v. *Standard Bank of Canada* (1909-10) 1 O. W. N. 379, 548. The Statute there considered was the Ontario Companies Act (1907) c. 34. s. 27 similar in its terms to section 33 of the Dominion Act. The same is true where the word "Company" is abbreviated to "Co." *Thompson* v. *Big Cities Realty & Agency Co.* (1910) 21 O. L. R. 394.

It should be noted that the section requires the name to be affixed on the outside of the office or place of business, and the object of the section and the literal meaning of the words used may perhaps require something more than the placing of the name of company on the outside of a suite of offices in an office building, although this is the usual course in actual practice.

Obtaining of Further Powers.

Company may authorize directors to apply to extend or reduce powers.

34. The company may, from time to time, by a resolution passed by the votes of shareholders representing at least two-thirds in value of the subscribed stock of the company, at a special general meeting called for the purpose, authorize the directors to apply for supplementary letters patent, extending the powers of the company to such further or other purposes or objects for which a company may be incorporated under this Part, or reducing, limiting, amending or varying such powers,

or any provisions of the letters patent or supplementary letters patent issued to the company, as are defined in such resolution." 4-5 Geo. V. 1914, c. 23, s. 4. Sect. 34.

Application by directors.

35. The directors may, at any time within six months after the passing of any such resolution, make application to the Secretary of State, for the issue of such supplementary letters patent. 2 E. VII., c. 15, s. 27.

Evidence of resolution.

36. Before such supplementary letters patent are issued, the applicants shall establish to the satisfaction of the Secretary of State the due passing of the resolution authorizing the application, and for that purpose the Secretary of State shall take any requisite evidence in writing, by oath or affirmation, or by statutory declaration under the Canada Evidence Act, and shall keep of record any such evidence so taken. 2 E. VII., c. 15, s. 28.

The following are the Departmental instructions:

The application for Supplementary Letters Patent extending, reducing, limiting or amending the powers of a company or any provisions of the Letters Patent or Supplementary Letters Patent should consist of the following documents, viz.—

1. Petition by Directors for Supplementary Letters Patent.

   The petition should be signed by the Directors or a majority of them, in person and in presence of a witness who should make the required statutory declaration of execution, and the seal of the company should be attached thereto.
2. Affidavit or Declaration verifying Signatures of the Petitioners.
3. Affidavit or Declaration verifying truth of facts set out in Petition.
4. Evidence that the by-law of the Directors was duly approved of at a meeting of shareholders, and that such meeting was called in accordance with the by-laws of the company.
5. Copy of by-law or resolution passed by the shareholders.
6. Affidavit or declaration verifying same.

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Supplementary letters patent granted. Notice of issue.

37. Upon the due passing of such resolution being so established, the Secretary of State may grant supplementary letters patent extending the powers of the company to all or any of the objects defined in the resolution; and notice thereof shall be forthwith given by the Secretary of State in the *Canada Gazette,* in the form D in the schedule to this Act

Effect of letters.

2. From the date of the supplementary letters patent, the undertaking of the company shall extend to and include the further or other purposes or objects set out in the supplementary letters patent as fully as if such further or other purposes or objects were mentioned in the original letters patent. 2 E. VII., c. 15, s. 29.

Subsection 3 requiring a copy of the notice to be advertised by the company was repealed by 7-8 George V. (1917) c. 25, s. 16. Section 113 of the Act imposing a penalty for failure to advertise the notice was likewise repealed by s. 14 of the same amending act.

Liability of Shareholders.

Limited to amount unpaid on stock.

38. The shareholders of the company shall not, as such, be responsible for any act, default or liability of the company, or for any engagement, claim, payment, loss, injury, transaction, matter or thing relating to or connected with the company, beyond the amount unpaid on their respective shares in the capital stock thereof. 2 E. VII., c. 15, s. 30.

Rule of limited liability.

At common law every member of an unincorporated partnership, whether it was an ordinary firm or a joint stock company with transferable shares, was personally liable for all debts contracted while he was a member. Numerous attempts were made to evade this rule but owing to modern facilities for incorporation, they have ceased to be of practical interest. The fundamental rule of limited liability is that from the moment of incorporation the members cease to be in any way liable for the debts of the body corporate, unless there is express statutory provision that the shareholders shall be liable: *Emerson* v. *Flint* (1858) 7 C. P. 161; and see *Salomon* v. *Salomon* (1897) A.C. 22.

Rests on holding of shares.

All companies under the act, except those incorporated for purposes other than gain under s. 7 A, are limited by shares. Membership in the company is

conferred by and the liability of the members rests on the holding of shares in the capital stock. The sole obligation of the shareholder as such is to pay the amount owing in respect of the shares held by him and this obligation is primarily one due to and enforceable by the company. Sect. 38.

Extent of obligation.

The obligation of the shareholder is to pay up the full par value of his shares; there is no provision in the act for the issue of shares at a discount as may be done under the Ontario Companies Act, Part XI., though a similar result can be accomplished by the issue of shares without par value under s. 7B. The company may, however, pay a commission on the sale of its shares and a power to do so should appear in the letters patent, and to this extent the rule that the company must receive dollar for dollar for its shares is cut down. See *Metropolitan Coal Consumers Association* v. *Scrimgeour* (1895) 2 Q. B. 604; *Andreae* v. *Zinc Mines & Ltd.* (1918) 87 L. J. Ch. 1019.

Mode of payment.

Shares may be paid for either in cash or in some other way. Thus where an officer of the company had credited himself with disbursements properly made it was held that his shares were paid up in this manner: *Re Ottawa Cement Block Co., McCoun's Case* (1907) 14 O. L. R. 389.

Where applicants for shares had signed the stock book for two shares each for the purpose of incorporating the company, and it was agreed between them and a partnership, vendors to the company of certain assets for paid up shares, that on the completion of the transaction with the company there would be issued to them, as part of the sale consideration of three hundred shares, two fully paid shares representing the two shares subscribed for by each, it was held that the liability on the shares was satisfied: *Re C. B. C. Corest Co.* (1908) 12 O. W. R. 185. Teetzel, J., at p. 186 of the report said, " None of the transactions are impeached as fraudulent, and it seems to me that it was competent for the company, with the assent of all

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parties concerned to exchange *pro tanto* the obligation of the company to issue shares under the agreement of purchase for the obligations of the appellants to pay for the....shares subscribed for by them."

Payment by promissory note.

It is not illegal for a company to take a promissory note in payment of shares: *Standard Bank* v. *Stephens* (1908) 16 O. L. R. 115 and cases cited at p. 121; nor to issue paid-up certificates on receipt of the note under the circumstances in *Anglo-American Lumber Co.* v. *McLellan* (1908) 13 B. C. R. 318, (1908) 14 B. C. R. 93. But see *O'Sullivan* v. *Donovan* (1906) 8 O. W. R. 320. As to when a note constitutes payment see *Stewart Howe* v. *Meek* (1913) 9 D. L. R. 484, 485.

Payment by property or services.

Payment may be made in money's worth if the company has authorized such payment. The former act, R. S. C., 1886, c. 119, s. 27, required a written contract to be filed with the Secretary of State at or before the issue of the shares, where these were issued for a consideration other than cash. See *Morris* v. *Union Bank* (1901) 31 S. C. R. 594; *Re Jasper Liquor Co.* (1915) 23 D. L. R. 894. This provision has now been dropped, but such contracts must be disclosed in the prospectus where s. 43A of the act applies.

Where a company chooses to take property, services or other consideration not possessing an obvious money value in payment of shares, the value placed by the parties on such consideration will be accepted by the Court, and so long as the contract is not impugned in an action to set it aside the court will not examine into the adequacy of the consideration; *Re Hess* (1894) 23 S. C. R. 644; *Pell's Case* (1870) L. R. 5 Ch. 11; *Re Wragg, Ltd.* (1897) 1 Ch. 796; *Re Theatrical Trust* (1895) 1 Ch. 771; *Re Innes & Co.* (1903) 2 Ch. 254, *Re North Bay Supply Co.* (1905) 6 O. W. R. 85; *Jones* v. *Miller* (1893) 24 O. R. 268; *National Trust* v. *Frank* (1917) 3 W. W. R. 43. See also *Re Modern House &c., Co., Goudy's Case* (1913) 28 O. L. R. 237; (1913) 29 O. L. R. 266.

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The agreement must be between the subscriber and the company, and if it is made betwen the subscriber and the person who solicited him to become a shareholder it will not bind the company: *Christin* v. *Union Navigation Co.*, Ramsay's Digest 391 (Q. B. 1882). The same is true of an agreement made with a provisional director of a railway company on condition that the subscriber shall receive the contract for building the road: *Wilson* v. *Ginty* (1878-9) 3 A. R. 124, and see *Jones* v. *Montreal Cotton Co.* (Q. B. 1878) 24 L. C. J. 108, 1 L. N. 450.

Illustrations.

In the following cases the shareholder was held to have paid up his shares:—*Re Wragg, Ltd.* (1897) 1 Ch. 796, set-off of existing debt; *Re Theatrical Trust* (1895) 1 Ch. 771, agreement to render services; *Gardiner* v. *Iredale* (1912) 1 Ch. 770, agreement by company for immediate payment for future services; *Inglis* v. *Wellington* (1878) 29 U. C. C. P. 387, agreement for payment by performance of services; *Re Hess* (1894) 23 S. C. R. 644, transfer of property.

In the following instances shares were held not to have been paid up:—*Pellatt's Case* (1867) 2 Ch. 527, agreement to accept supply of goods in future; *Re Eddystone Marine Insurance Co.* (1893) 3 Ch. 9, agreement to issue shares in payment of past services: *Ooregum* v. *Roper* (1892) A. C. 125, consideration illusory; *Almada and Tirito Co.* (1888) 38 Ch. D. 415, shares issued at a discount; *Re Wragg Ltd.* (1897) 1 Ch. at p. 831, issue of paid up shares in satisfaction of a debt of less amount than their par value; *Collingwood Dry Dock, Weddell's Case* (1890) 20 O. R. 107, services in connection with formation of the company; *Union Bank* v. *Morris & Code* (1900) 27 A. R. 396, subscriber received back portion of amount paid in consideration for services rendered; *Colonial Insurance Co.* v. *Smith* (1913) 23 Man. L. R. 243, consideration unsubstantial and illusory; *Re Cornwall Furniture Co.* (1910) 20 O. L. R. 520, bonus stock; *Re Owen Sound Lumber Co.* (1917) 33 D. L. R. 487, 38 O. L. R. 414, shares allotted to promoters for profits in fact belonging to the com-

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pany; *Moseley* v. *Koffyfontein* (1904) 2 Ch. 108; *Winnipeg Hedge & Wire Fence Co.* (1912) 22 Man. L. R. 83; *Ex parte Clark* (1869) 7 Eq. 550; *Scales* v. *Irwin* (1874) 34 U. C. R. 545.

Belief that no liability exists.

A belief that there is no further liability on the shares if the shareholder knows in fact that they are not paid up is not sufficient and the shareholder is liable in respect of the amount unpaid in a winding-up: *Re Wiarton Beet Root Sugar Co., Alexander McNeill's Case* (1905) 10 O. L. R. 219; *Re James Pilkin & Co.* (1916) 85 L. J. Ch. 318.

Estoppel.

Under certain circumstances, however, the company may be estopped from denying that the shareholder has paid his shares up in full: *Neelon* v. *Town of Thorold* (1893) 23 S. C. R. 390. It was held in *Penang Foundry Co.* v. *Gardiner* (1913) S. C. 1203 Ct. of Sess. that the defendant having *bona fide* relied on the statement in the certificate issued to him that shares were fully paid, the company and its liquidator were debarred from maintaining the contrary. It is a little difficult to reconcile this case with others on the subject. See also *Monarch Life &c. Co.* v. *Mackenzie* (1911) 15 D. L. R. 695.

Transferee.

Even if shares are not in fact paid up in full the holder may be relieved from liability if the certificate stating on its face that the shares have been fully paid has been acquired by him for value from the original allottee: *McCraken* v. *McIntyre* (1878) 1 S. C. R. 479; *Kettle River Mines* v. *Bleasdell* (1900) 7 B. C. R. 507 where a promoter had sold part of his allotment and had the shares which purported to be fully paid up transferred direct from the company to the purchaser.

What if the allottee of shares issued at a discount, as to which accordingly liability attaches, transfers them to a person for value without notice and then subsequently re-acquires them from that purchaser? *In re Railway Timetable Co. Ex p. Sandys* (1889) 42 Ch. D. 98 this was done, the allottee exchanging fully paid up shares in the company for shares in the same

company issued at a discount (which she erroneously believed were fully paid up) which she had previously sold to the transferor. Stirling, J., held (and no appeal was taken as to these particular shares) that as she had re-purchased them from a purchaser for value without notice she was entitled to them as fully paid up. And shareholders who have not subscribed for their shares but who have obtained them as fully paid up by transfer from the original allottee can not be placed on the list of contributories: *National Trust* v. *Frank* (1916-7) 10 Sask. R. 250; (1917) 3 W. W. R. 43. Sect. 38.

When the certificate bears on its face evidence of irregularity of issue, or the person acquiring the shares knows that they have not been paid for or that they never have been issued at all, the liability is not avoided: *Northwest Electric Co.* v. *Walsh* (1898) 29 S. C. R. 33. Notice.

The shareholder also escapes liability to make further payment on his shares after a valid transfer thereof: *In re Wiarton Beet Root Sugar Co., Freeman's Case* (1906) 12 O. L. R. 149. There are no provisions in the Act similar to those contained in the Imperial Act making past members secondarily liable after their shares have been transferred. See notes to section 64 on transfers of shares, also notes to sections 65 and 66 which impose restrictions on the transfer of shares not paid up in full and forbid the transfer of shares on which previous calls have not been paid. Effect of transfer

39. Every shareholder, until the whole amount of his shares has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon; but he shall not be liable to an action therefor by any creditor until an execution at the suit of such creditor against the company has been returned unsatisfied in whole or in part. Liability of shareholders. Action when.

2. The amount due on such execution, not exceeding the amount unpaid on his shares, as aforesaid, shall be the amount recoverable, with costs, from such shareholder. Amount recoverable.

3. Any amount so recoverable, if paid by the shareholder, shall be considered as paid on his shares. 2 E. VII., c. 15 s. 31. Application.

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Apart from the shareholder's contractual liability to pay to the company the full amount of his shares, this section imposes under certain circumstances, a statutory liability to the creditors of the company. The creditor seeking to take advantage of this statutory right must bring the defendant within the precise terms of the statute by showing him to be in the strictest sense a shareholder: *Denison* v. *Leslie* (1879) 3 A. R. 536; so the creditor failed in his action where the defendant had transferred his shares to another, although the transfer had not been registered: *Hamilton* v. *Grant* (1900) 30 S. C. R. 566. It is furthermore required that the creditor should first have sued the company and that execution has been returned unsatisfied. This requirement must be rigidly complied with. In one case the sheriff in the creditor's suit against the company endorsed on the writ of execution that there were no goods, but the writ was not returned. It was held that the plaintiff had not brought himself within the corresponding section of the existing Ontario Act, 1907, c. 34, s. 68: *Grills* v. *Farah* (1910) 21 O. L. R. 457. It was there further stated that the execution must not be a "mere illusory formal proceeding to give colour to proceedings against a shareholder." The Canadian cases are collected at pp. 460-1 of the report. The creditor's right is lost after a winding-up order has been made: *Shaver* v. *Cotton* (1896) 23 A. R. 426, the reason being that "unpaid stock is an asset of the company, and the moment a winding up order is made, that unpaid stock has, in effect, been appropriated for rateable distribution among the creditors of the company . . . the winding-up order requires that the stock shall be applied to the payment of all creditors without preference or priority, while the action seeks to have it paid exclusively to the plaintiff," per Maclennan, J. A., at p. 437. See also *Wiarton Beet Root Sugar Manufacturing Co., Alexander McNeill's Case* (1905) 10 O. L. R. 219.

Any creditor is entitled to bring the action and it is no defence for the shareholder to plead that other

actions by different creditors are pending: *Perry* v. *McCraken* (1876) 7 P. R. 32. Sect. 39.

Whatever may be the state of disorganization into which a company has fallen, its creditors may always exercise their rights against it and its shareholders: *Hughes & La Compagnie de Villas du Cap Gibraltar et Lalonde* (1889) 5 M. L. R. S. C. 129.

The following decided cases are illustrations of the application of this section:—

1. *Nixon* v. *Green* (1856) 11 Ex. 550, as to the time at which liability of the shareholder to the creditor becomes fixed.

2. *Brice* v. *Munro* (1885) 12 A. R. 453, in which it was held that in order to bring an action in Ontario against a shareholder of a company whose head office is in another Province, it is sufficient to show a return of execution unsatisfied in such other province.

3. In an action against a shareholder to recover the amount of a judgment against the company, defendants alleged that the judgment against the company was recovered upon promissory notes given to the plaintiff by the company without consideration and when it was insolvent to his knowledge, and that the notes were in fraud of creditors and *ultra vires*. It was held that these defences might have been raised in the original action, but were not available in this: *Shaver* v. *Cotton* (1894) 16 P. R. 278.

4. The section impliedly limits the liability of shareholders to the amount unpaid on their shares: *McGill Chair Company* (1912) 26 O. L. R. 254, per Meredith, C. J., at p. 260.

5. Where shares had been allotted at a discount as fully paid up, a transferee who purchased them in good faith from an original shareholder, was held not to be liable to an execution creditor for the amount unpaid thereon: *McCraken* v. *McIntyre* (1878), 1 S. C. R. 479.

6. N., a director of a company, agreed to lend $100,000 to the company on the security of certain

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shares held by B., which were to be fully paid up. B. had 188 shares, and had paid forty per cent. on them, but being unable to pay up the balance the directors agreed to treat this sum as in full for 75 shares. N. agreed to this, and N. took a transfer of the 75 shares. No formal resolution of the directors was passed authorizing the appropriation of the money paid by B. In an action of a shareholder of the company against N. it was held that the company having got the benefit of a loan by N. was estopped from disputing the application of the money paid by B. in such a way as to constitute N. the holder of the 75 shares, and creditors not having been prejudiced were bound in the same way: *Neelon* v. *Town of Thorold* (1893) 22 S. C. R. 390.

7. The defendant shareholder of a company against which he had a claim for goods sold got a note from the company, transferred it to F. as trustee; F. sued the company to judgment and on a return of *nulla bona* sued the defendant who paid him the amount of the unpaid stock which amount F. then held as defendant's trustee.

It was held that payment to F. was not payment of the defendant's stock and no answer therefore to an action against the defendant by a creditor who had also got judgment against the company and issued execution on which a return of *nulla bona* had been made: *McGregor* v. *Currie* (1876) 26 U. C. C. P. 55.

8. After a creditor of a company had commenced an action against a shareholder in respect of his unpaid stock, one B. recovered a judgment against the company, part of which was assigned to the defendant with the object of procuring him a set-off against the plaintiff's claim. Held, that the procuring of such an assignment by defendant with notice of plaintiff's claim, did not constitute a defence to it; but *semble,* if the set-off had accrued to the defendant in his own right, although after action brought, it would have been otherwise: *Field* v. *Galloway* (1884) 5 O. R. 502.

The remainder of the judgment was assigned to M., who after the commencement of the plaintiff's action,

and with knowledge thereof, and with the object of giving defendant a good set-off against plaintiff's claim, recovered a judgment against the defendant without defence, and defendant paid him the amount unpaid on the stock. Held that the judgment so recovered and the payment thereunder constituted a good defence to the plaintiff's claim; and that the prior commencement of the plaintiff's action was immaterial, *ibid.* Sect. 39.

9. The plaintiff performed certain work amounting to $465 for the defendants, a joint stock company, incorporated under R. S. O. c. 150, under an agreement for payment in shares of the capital stock of the company.

It was held that the agreement was not *ultra vires* of the company and that the plaintiff's acceptance of the shares under such agreement would not render him liable to pay the amount thereof to creditors of the company: *Inglis* v. *Wellington Hotel Co.* (1878) 29 U. C. C. P. 387.

The following cases may also be referred to as showing the circumstances under which shares will be held to have been paid up or not.

1. Where the issue of paid up shares was in consideration of compensation for organizing the company, costs of obtaining the charter, etc., such consideration was found to be unsubstantial and illusory: *Colonial Assurance* v. *Smith*, 23 Man. L. R. 243.

2. Where the applicant for shares paid the full amount due on them, but received back a portion of the amount as consideration for services to be rendered, it was held that the shares to this amount were unpaid: *Union Bank* v. *Morris & Code* (1900) 27 A. R. 396.

3. A municipal bonus of $15,000 (the property of the company) was used to issue bonus shares to persons who were then shareholders, as paid up, in proportion to the stock held by them at that date.

Although the shareholders accepted the stock *bona fide* they were held properly placed on the list of

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contributories: *Cornwall Furniture Co.* (1900) 20 O. L. R. 520.

Payment in full.

4. The plaintiff, a creditor of a company incorporated by letters patent, sued the defendant, a shareholder, who pleaded that there was nothing due upon his stock. It appeared that there were nine shareholders, two of whom had a large claim against the company for the sale of a patent. The defendant held $5,000 stock, partly paid up. It was arranged between the patentees and the other shareholders, that the latter should pay an additional ten per cent. on their stock, in consideration of which the patentees were to pay up the balance of the unpaid stock of the seven other shareholders out of this claim. In pursuance of this arrangement, each of the seven gave his cheque to the secretary for the balance of his unpaid stock, which the secretary passed on to the patentees, who accepted them and gave receipts to the company for the amount. The patentees then handed back the cheques and receipts to the secretary, who returned the cheques to the shareholders, by whom they were given, it having been agreed beforehand that they were to be so returned and not used. Held that this transaction was not a payment in full of the stock, and that defendant was liable: *Scales* v. *Irwin* (1874) 34 U. C. R. 545.

5. Where defendants took stock in a company, and by agreement paid for it in land considerably overvalued, it was held that the stock must be considered as fully paid up, and defendants were not liable to creditors of the company, no fraud being shown: *Jones* v. *Miller* (1893) 24 O. R. 268.

6. Where the defendant in good faith bought shares at a discount of 50 per cent., allowed himself to be placed on the register of shareholders and attended meetings, he was held liable to the creditors of the company to the extent of the amount unpaid: *Bank of Ottawa* v. *Jones* (1919) 46 D. L. R. 407.

Set off against creditor's action.

40. Any shareholder may plead by way of defence in whole or in part to any action by any creditor under the last preceding section any set-off which he can set up against the company,

except a claim for unpaid dividends, or a salary or allowance as a president or a director of the company. 2 E. VII., c. 15, s. 31. Sect. 40.

While the company is a going concern, a set-off may be pleaded by the shareholders against the amount claimed by the company in respect of his shares. The benefit of the defence is available under section 40 in the case of an action by a creditor, except as to claims for unpaid dividends or salary or allowance as president or director. It is to be noted that the classes "president or a director" alone are referred to, and accordingly it is not clear that a vice-president or a manager, for example, could not set off claims for unpaid salary. The point does not appear to have been judicially decided.

The right is a statutory one and does not exist apart from the section: *Benner* v. *Currie*, 36 U. C. R. 411.

The set-off must be in the same right, so a debt owing to shareholders as the price paid by a company for the transfer to it of partnership assets cannot be set off by them against their individual liability on shares: *Turner* v. *Cowan* (1903) 34 S. C. R. 160.

The set-off may be pleaded against the claim made in the action only and not against anyone other than the plaintiff: *Grills* v. *Farah* (1910) 21 O. L. R. 457, 459.

A set-off may be claimed even though a creditor may have commenced action against the shareholder before the set-off accrued. Thus where B. recovered judgment against the company, assigning part of his judgment to M., who with knowledge of the existence of the plaintiff's action and with the object of giving the defendant a good set-off, recovered judgment against the defendant without defence and the defendant paid him the amount unpaid on his stock, it was held that this constituted a good defence: *Field* v. *Galloway* (1884) 5 O. R. 502.

It is not necessary for money actually to pass between the shareholder and the company for the purpose of a set-off: *Larocque* v. *Beauchemin* (1897) A. C. 358.

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So also in a case under the Winding-up Act, when the secretary-treasurer of a company credited himself with disbursements properly made for the company and so sought to render his shares paid up, it was held that this constituted payment of the shares: *Re Ottawa Cement Block Company, Macoun's Case* (1907) 14 O. L. R. 389.

But in *Re Consolidated Investments, Ltd., Simons' Case* (Alta.) (1918) 2 W. W. R. 581, where the arrangement for set-off was not made with the directors, and no call had been made, and there were no entries in the company's books evidencing the set-off, the shareholder was held liable.

As to whether a claim sounding in damages can be set up under the section, see *Grills* v. *Farah* (1910) 21 O. L. R. 457, decided on the corresponding section of the Ontario Companies Act (1907) c. 34, s. 68.

See further the notes to section 71 of the Winding-up Act, *infra*.

Trustees, not personally liable.

Estate liable.

41. No person, holding stock in the company as an executor, administrator, tutor, curator, guardian or trustee of or for any person named in the books of the company as being so represented by him, shall be personally subject to liability as a shareholder; but the estate and funds in the hands of such person shall be liable in like manner, and to the same extent, as the testator or intestate would be if living, or the minor, ward or interdicted person, or the person interested in such trust fund would be, if competent to act and holding such stock in his own name.

Holder of stock as collateral security.

2. No person holding such stock as collateral security shall be personally subject to such liability, but the person pledging such stock shall be considered for the purposes of such liability as holding the same and shall be liable as a shareholder accordingly. 2 E. VII., c. 15, s. 32.

Common law rule.

At common law it was thoroughly established that one to whom stock had been transferred as a pledge, or as collateral security for money loaned, or as a trustee for another, and who appeared on the books of the corporation as the owner of the stock, was liable as a stockholder for the benefit of creditors. The reason why the courts so held, briefly, was, that a man cannot

become the legal owner of stock, receive dividends, vote at meetings, and enjoy all other rights appertaining to ownership of it without shouldering the liability attaching to such a position. Sect. 41.

Another good reason was that he would not be allowed to hold himself out to the public as the owner of stock and afterwards deny the relation. Besides, if creditors were compelled to look beyond the legal title they could never know against whom to proceed, and it would embarrass them in the pursuit of their rights to compel them to enquire into equities which might exist between the stockholder and some third person: Thompson, par. 3213; *Franklin* v. *Neate* (1844) 13 M. & W. 481.

Under the Imperial Companies Act of 1862, which forbids the entry of trusts on the register (s. 30) the trustee whose name is on the register is the shareholder; he and not the *cestui que trust* is the person liable to the company for all payments and obligations attaching to the shares: *Ex p. Isaac Bugg* (1865) 2 Dr. & Sm. 452; *Bunns' Case* (1860) 2 D. F. & J. 275, 300; *Drummond's Case* (1860) 2 Giff. 189; *Barrett's Case* (1864) 4 D. J. & S. 416. This applies equally where the trustee is a trustee for the company itself: *Re Chapman & Barker's Case* (1867) L. R. 3 Eq. 361. English rule

His liability moreover is not and cannot be limited to the amount of the trust estate: *Muir* v. *Glasgow Bank* (1879) 4 App. Cas. 337; *Hoare's Case,* 2 J. & H. 229; *Leifchild's Case* (1865) L. R. 1 Eq. 231.

The *cestui que trust,* however, is sometimes brought into immediate contact with the company, *e.g.,* by being rendered liable for the shares which his trustee has been unable to pay for: *Hemming* v. *Maddick* (1872) L. R. 7 Ch. 395; *National Financial Co., Ex p. Oriental Commercial Bank* (1868) L. R. 3 Ch. 791.

And a *cestui que trust* who is *sui juris* is under a personal obligation not limited to the trust property to indemnify his trustee against calls: *Hardoon* v. *Belilios* (1901) A. C. 118, 123.

Sub-section 1 exempts from personal liability any person holding shares in the capacities specified "for Section 41 (1).

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any person named in the books of the company as being so represented." The words in quotation marks did not appear in R. S. C. 1886 c. 129, s. 56 corresponding to the present section.

Executors and administrators.

An executor or administrator is not personally liable on the shares held by the deceased. Where, however, executors or administrators distribute assets of the estate without providing for liability on shares they are guilty of a devastavit and become personally liable to the company or its liquidator. The devastavit constitutes a new cause of action which is barred in six years; but the cause of action for the amount due on the shares is based on contract, and until a call is made time does not run in respect of the liability of the executors or administrators as such, which is a liability of the deceased and his estate. Where liability is enforced on the latter ground the judgment will be directed to be levied out of the goods, etc., of the deceased in the hands of the executors or administrators, if any: *Clarkson* v. *McLean* (1917-8) 42 O. L. R. 1.

Beneficiaries.

Where beneficiaries of a deceased holder of bank shares were at the time of the liquidation of the bank beneficial owners of the shares, and had accepted transfers of the shares though the transfers had not been recorded, the estate being liable in the hands of the administrators and assets of value of far greater amount were likewise distributed, it was held that each beneficiary in equity undertook to assume and protect the administrators against the incidental liability to calls to the extent of the shares transferred to him. Each beneficiary was also liable to refund and pay to the creditor the amount due to the extent of the assets received by him which formed part of the intestate's estate: *Clarkson* v. *McLean, supra.*

Trustees.

The protection of the section extends only to a trustee who represents an estate, and will not relieve from liability a person who is expressed to be a trustee for a syndicate: *Re Winnipeg Hedge and Wire Fence Co.* (1912) 1 D. L. R. 316; 22 Man. L. R. 83. It was there held that such designation of the shareholders merely

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earmarked the shares, and furthermore the defendant being himself beneficially interested in the syndicate was not to be regarded as a trustee. To enable the trustee to take advantage of the section the beneficiary must be named in the books of the company: *Re British Cattle Supply Co., McHugh's Case* (1919) 16 O. W. N. 62, 206.

As to special circumstances in which a holder of shares may become personally liable in spite of this section, although he is not holding the shares for his own benefit, but in some way as trustee for others. See *Re Union Fire Insurance Co., McCord's Case* (1891) 21 O. R. 264, and *Ontario Investment Association* v. *Leys* (1893) 23 O. R. 496. See also *In re President, etc., Westmoreland Bank, Ex p. Allison* (1869) 12 N. B. 514.

In the first mentioned case the company's manager was authorized to purchase from the holder on the company's behalf shares on which calls were due. Although the shares were transferred to the "manager in trust" he was held liable on the shares in a winding-up, notwithstanding that the purchase was in trust for the company.

If a trustee holds shares for several *cestuis que trust*, one of the latter can not compel the trustee to divest himself of a portion merely of the trust estate, viz., the shares to which the particular *cestui que trust* is entitled, the principle being that the trustee should not be compelled to divest himself of the trust estate piecemeal. If he is to be divested of the trust he is entitled to demand to be wholly relieved: *Bechtel* v. *Zinkan* (1907) 10 O. W. R. 1075.

Holder of stock as collateral security. Sub-section 2.

As to the meaning of "collateral security," see *Early* v. *Early* (1880) 49 L. J. Ch. 826 (n). It does not mean "auxiliary" or "secondary," *ibid.* At any rate as against a liquidator the holder of shares as collateral security will not escape liability if he takes a transfer in absolute form. Thus a loan company which advances money on shares in a bank which are transferred to it, and accepted by it in the ordinary absolute form, cannot escape liability as a contribu-

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tory on the ground that it is merely a trustee for the borrower: *Re Central Bank of Canada, Home Savings and Loan Co.'s Case* (1891) 18 A. R. 489. But compare wording of Bank Act, 3-4 Geo. V. c. 9, s. 53.

The onus is on the pledgee to show that he holds the shares in such capacity: *Re Empire Accident, &c., Co.* (1913) 10 D. L. R. 782, affirmed (1913) 11 D. L. R. 847; but if he succeeds he is a creditor and can rank on the assets as such: *Re Central Bank, N. A. Life Ins. Co.'s Case* (1890) 30 C. L. T. 275.

As against the company or a creditor in a *scire facias* proceeding the liability of a mortgagee who holds a clean certificate is not free from doubt.

In an Ontario case where a mortgagee of shares had taken a transfer absolute in form, and caused it to be entered in the books of the company as an absolute transfer the Supreme Court considered he was not estopped from proving that the transfer of shares was by way of mortgage. (This view was, however, *obiter*): *Page* v. *Austin* (1884) 10 S. C. R. 132. But see the same case in 30 C. P. 108, and 7 A. R. 8, supporting the opposite view.

The view of the Supreme Court has been adopted in Quebec in the case of *Molsons Bank* v. *Stoddart*, S. C. (1890) M. L. R. 6 S. C. 17.

If shares are taken as collateral security the creditor should either obtain a clean certificate in the name of himself if the shares are paid up or take a charge and give notice to the company if they are not fully paid up.

Where a transfer of shares to a bank by way of collateral security was registered in favor of the manager "in trust" it was held that a deduction of the pledging shareholder's debt to the company (not being for calls) might not be made from dividends on the shares subsequent to the transfer: *Wilson* v. *B. C. Refining Co.* (1915) 22 D. L. R. 634, where the cases are collected. It was further held that the British Columbia section corresponding to s. 41 has no reference to the case where a transfer of shares is made, and only applies when the shares appear to have been pledged

as collateral security, and the real owner's name remains on the books of the company. Sect. 41.

For the purposes of liability the pledgor is to be considered as the holder of the shares, s. 41 (2): *Wilson* v. *B. C. Refining Co., supra.* Pledgor.

See the notes to s. 64.

Where a company attempts to allot its stock as security for its own debts the section does not apply, as it has reference to the stock of a shareholder only: *Re Perrin Plow Company, Allan's Case* (1908) 11 O. W. R. 186; (1908) 12 O. W. R. 387. But the company may be estopped from asserting that there is any liability on the shares if it has represented that they are paid up: *In re Charles H. Davies, Limited, McNicol's Case* (1909) 18 O. L. R. 240. In that case a person sought to be made a contributory in a winding-up had agreed to take one share in a company. He had, however, also received a certificate for five shares described as "fully paid," four of which he had been informed by the managing director of the company were intended as security only for an accommodation note which the defendant had given. There had been no stock subscribed for or allotted to the defendant, but a dividend on one share had been paid to him. It was held, that since the company had obtained the loan by a representation that the shares were fully paid, which representation the defendant had acted upon, the company and the liquidators were estopped from maintaining that the shares were not paid up and the defendant was a contributory in respect of one share only. See also *Bloomenthal* v. *Ford* (1897) A. C. 156. Loans on security of shares. Company giving security on its own shares.

The person who is the legal owner of the shares is the shareholder and is liable to be placed on the list of contributories in a winding-up, notwithstanding that he is trustee for another: *Standard Mutual Fire Ins. Co., Musson's Case* (1910) 1 O. W. N. 974; 46 Can. L. J. 505. Conversely a *bona fide* purchaser of shares in the name of a trustee can not be put on the list: *King's Case* (1871) L. R. 6 Ch. App. 196. The *cestui que trust* Legal owner and *cestui que trust.*

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is not the shareholder; the trustee is, and the *cestui que trust* is not entitled to make the company account to him for the shares or any dealings therewith, *e.g.*, he is not entitled to receive notice of calls: *Armstrong* v. *Merchants' Mantle, &c., Co.* (1901) 32 O. R. 387.

Trustees represent stock and pledgor.

42. Every such executor, administrator, curator, guardian or trustee shall represent the stock held by him, at all meetings of the company, and may vote as a shareholder; and every person who pledges his stock may represent the same at all such meetings and, notwithstanding such pledge, vote as a shareholder. 2 E. VII., c. 15, s. 33.

Voting rights.

Section 41 only affects the liability of the trustee, not his status as shareholder. He is entitled to be so regarded and exercise the rights of a shareholder, *e.g.*, to vote, a right which is expressly conferred by s. 42.

Trustee.

Pledgee.

The pledgee likewise is the person entitled to vote in respect of the shares held by him, unless the right is taken away by statute as it is by s. 42: *Empire Accident and Surety Company, Faill's Case* (1913) 4 O. W. N. 926, 1411.

Mortgagee.

Where the borrower does not merely pledge the shares but the lender takes an out and out transfer by way of mortgage s. 42 does not apply so as to prevent the mortgagee from voting on the shares. Trustees for bondholders holding as security specifically mortgaged shares in a subsidiary company are, unless the trust deed otherwise provides, entitled to vote on the shares even before default: *Siemens Bros. & Co.* v. *Burns* (1918) 87 L. J. Ch. 572.

If the mortgagee has, however, agreed to vote on the shares in accordance with the mortgagor's direction, he is bound to do so and the Court will enforce the agreement by mandatory injunction: *Puddephat* v. *Leith* (1916) 85 L. J. Ch. 185; (1916) 1 Ch. 200.

Executor.

An executor likewise is entitled to vote on the shares held by him in that capacity. If he acquires in his personal capacity sufficient shares in the company to take away the majority control from the holding of the estate which he represents, he should relinquish his trust: *Rose* v. *Rose* (1914-5) 7 O. W. N. 416.

Prospectus. Sect. 43.

Definition "Prospectus."

43. In this Act, unless the context otherwise requires, the word "prospectus" shall have the meaning hereby assigned to it, that is to say: "Prospectus" means any prospectus, notice, circular, advertisement or other invitation offering to the public for subscription or purchase any shares or debentures of a company. *Imp. Act, 1908, s. 285.*

Filing of prospectus.

43A. (1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorized in writing, shall be filed for registration with the Secretary of State of Canada, on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3) The Secretary of State of Canada shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable on summary conviction to a fine not exceeding twenty dollars for every day from the date of the issue of the prospectus until a copy thereof is so filed. *Imp. Act, 1908, s. 80.*

Specific requirements as to particulars of prospectus.

43B. (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state,—

(*a*) the contents of the letters patent and supplementary letters patent, with the names, descriptions, and addresses of the signatories to the petition for incorporation, and the number of shares subscribed for by them respectively; and the number of founders' or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and,

(*b*) the number of shares, if any, fixed by the by-laws of the company as the qualification of a director, and any provision in the said by-laws as the remuneration of the directors; and,

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(*c*) the names, descriptions, and addresses of the directors or proposed directors; and,

(*d*) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscriptions on each previous allotment made within the two preceding years, and the amount actually allotted; and the amount, if any, paid on the shares so allotted; and,

(*e*) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued; and,

(*f*) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors; and,

(*g*) the amount (if any) paid or payable as purchase money in cash, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for good will; and,

(*h*) the amount (if any) paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission: Provided that it shall not be necessary to state the commission payable to sub-underwriters; and,

(*i*) the amount or estimated amount of preliminary expenses; and,

(*j*) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and,

(*k*) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided

that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or to any contract entered into more than two years before the date of issue of the prospectus; and,

(*l*) the names and addresses of the auditors (if any) of the company; and,

(*m*) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm with a statement of all sums paid or agreed to be paid to him or the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or, otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and,

(*n*) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.

(2) For the purposes of this section every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where,—

(*a*) the purchase money is not fully paid at the date of issue of the prospectus; or,

(*b*) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or,

(*c*) the contract depends for its validity or fulfilment on the result of that issue.

(3) Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

(4) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(5) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the letters patent and supplementary letters patent, the signatories

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to the petition for incorporation, and the number of shares subscribed for by them.

(6) In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that,—

(*a*) as regards any matter not disclosed, he was not cognizant thereof; or,

(*b*) the non-compliance arose from an honest mistake of fact on his part;

Provided that in the event of non-compliance with the requirements contained in paragraph (*m*) of subsection (1) of this section no director or other person shall incur any liability in respect of the non-compliance unless it be proved that he had knowledge of the matters not disclosed.

(7) This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons; but subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently.

(8) The requirements of this section as to the letters patent and supplementary letters patent and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company commenced business.

(9) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section. *Imp. Act, 1908, s. 81.*

Obligations of companies where no prospectus is issued.

43c. (1) A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the Secretary of State of Canada a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorized in writing, in the form and containing the particulars set out in Form F in the Schedule to this Act. *Imp. Act, 1908, s. 82 (1).*

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the first day of January, 1918. *Imp. Act, 1908, s. 82 (2).*

Meaning of "private company."

(3) For the purposes of this section the expression "private company" means a company which by its letters patent or supplementary letters patent,—

(*a*) restricts the right to transfer its shares; and,

(*b*) limits the number of its members (exclusive of persons who are in the employment of the company and of persons who having been formerly in the employment of the company were, while in such employment and have continued after the termination of such employment to be members of the company) to fifty; and,

(*c*) prohibits any invitation to the public to subscribe for any shares or debentures of the company. *Imp. Acts, 1908, s. 121 (1) and 3 & 4 Geo. V., c. 25.*

(4) A private company may, subject to anything contained in the letters patent and supplementary letters patent, by passing a resolution at a special general meeting of the company called for that purpose and by filing with the Secretary of State of Canada such a statement in lieu of prospectus as the company, if a public company, would have had to file before allotting any of its shares or debentures and by obtaining supplementary letters patent confirming the resolution, turn itself into a public company. *Imp. Act, 1908, s. 121 (2).*

(5) Where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this section, be treated as a single shareholder. *Imp. Acts, 1908, s. 121 (3).*

Liability for statements in prospectus.

43D. (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the prospectus, and every person who has authorized the naming of him and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorized the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved,—

(*a*) With respect to every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true; and,

(*b*) With respect to every untrue statement purporting to be a statement by, or contained in what purports to be a copy of or extract from a report or valuation of, an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation: Provided that the director, person named as

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director, promoter, or person who authorized the issue of the prospectus, shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it; and,

(c) With respect to every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document, unless it is proved—

(i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus and that it was issued without his authority or consent; or,

(ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or,

(iii) that after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2) Where a company existing on the first day of September, one thousand nine hundred and seventeen, has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein, unless he has authorized the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorized or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorized the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof.

(4) Every person who, by reason of his being a director or named as a director or as having agreed to become a director, or of his having authorized the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution, as in the case of contract, from any other person who,

if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5) For the purposes of this section,—

The expression "promoter" means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company.

The expression "expert" includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him. *Imp. Act, 1908, s. 84* (7 & 8 Geo. V., 1917, c. 25, s. 7).

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Former section.

Former section.

Section 43 of R. S. C. 1906 which was repealed by 7 & 8 Geo. V. c. 25, s. 7, reads as follows.

"43. Every prospectus of the company, and every notice inviting persons to subscribe for shares in the company, shall specify the date of and names of the parties to any contract entered into by the company or the promoters, directors or trustees thereof before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise.

"2. Every prospectus or notice which does not specify such date and names shall, with respect to any person who takes shares in the company on the faith of such prospectus or notice without notice of such contract, be deemed fraudulent on the part of the officers of the company who knowingly issue such prospectus or notice. 2 E. VII c. 15, s. 34."

This section is similar in its terms to section 38 of the Imperial Companies Act (1867) and the English cases decided on the latter enactment are applicable here.

The section did not in express terms require a company to issue a prospectus, nor was any provision made for the filing of such a document with the Department as is required under the Companies Acts of the various provinces. However, if a company issued a notice inviting persons to subscribe for shares, or issued a document which came within the definition of a prospectus such notice or document must contain the particulars specified by the section. If it did not do

so, the document was declared by the section to be fraudulent on the part of the officers of the company who knowingly issued it.

This provision would seem to render it necessary to specify every contract entered into by the company or by a promoter, director, or trustee thereof, which might reasonably be expected to influence persons reading the prospectus or notice in determining whether or not they will apply for shares. The safer course would be to specify every such contract whether it was made before or after the person became a promoter, director, or trustee, and whether such contract relates directly or indirectly to the affairs of the company, or to the affairs of the promoters, directors, trustees, or other persons with whom any negotiations have been carried on. It is difficult to say what contracts might influence the minds of the various persons who might read the prospectus or notice, and the only absolutely safe course is to make the fullest disclosure. When, from a business point of view, it is inexpedient to disclose the affairs of the company, or when it would be inconvenient to specify all contracts, great care should be taken in considering what contracts should be specified and what contracts it would be safe not to mention. The remedy of a person who has taken shares on the faith of a prospectus not conforming to the requirements of this statutory provision is to sue those who issued the same for the damages he has suffered: *Sullivan* v. *Mitcalfe* (1880) 5 C. P. D. 455, and cases there cited. This case also discusses the question as to what contracts should be specified. The measure of damages, when the shares turn out to be worthless, may be the full amount paid for them: *Twycross* v. *Grant* (1877) 2 C. P. D. 469; and see *Peek* v. *Derry* (1887) 37 Ch. D. 541.

The words "knowingly issue" mean neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus: *Twycross* v. *Grant, supra.*

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It would seem that the notice must come from the company. Accordingly, the section would not appear to apply if the whole issue is sold to a broker who himself issues the prospectus, as the penalty is imposed merely on officers of the company and not on outside persons. Accordingly, it has been held that a trustee is not liable as an officer of the company: *Cornell* v. *Hay* (1873) L. R. 8 C. P. 328, per Honyman, J., at p. 335. It is immaterial whether the contracts are written or oral: *Capel* v. *Sims* (1888) 58 L. T. 807.

While the required details must be mentioned, no provision is made for inspection of the contracts referred to. There is no provision in the section for disclosure of the interest of directors in matters preliminary to the incorporation of the company, but this is left to be disclosed by their contracts with the company, particulars of which are required to be given by the section.

It has been held that the liability of the directors is joint and several: *Lefebvre* v. *Prouty* (1918) 54 Que. S. C. 490. The section refers to shareholders only, and, therefore, the remedy provided is not applicable in the case of bondholders and others: *Cornell* v. *Hay* (1873) L. R. 8 C. P. 328. And it has been held that it does not give a shareholder a right to repudiate his shares: *Gover's Case* (1875) 1 Ch. D. 182.

Waiver.

The statutory rights under Section 38 can be waived, but any waiver obtained by unfair dealing or trickery is void, and the person said to have waived must have sufficient information of what he was waiving; and, apart from fraud, the same principles apply to waiver clauses as are applicable to ambiguous or misleading statements in conditions of sale or releases: *Greenwood Leather Shod Wheel* (1900) 1 Ch. 421. But if there is no actual fraud, and non-disclosure of the required particulars is due to an honest mistake, a subscriber who has agreed to waive further compliance with the section than is contained in the prospectus, cannot maintain an action for damages against directors under this section: *MacLeay* v. *Tait* (1906) A. C. 24.

The repeal of the section by section 7 of the Companies Act Amendment Act, 1917, is effective from and after September 20, 1917. After that date unless a company (other than a private company or a corporation without share capital) files a prospectus it must file a statement in lieu of a prospectus before allotting any of its shares or debentures (s. 43C (1)). unless it has allotted any of its shares or debentures before January 1, 1918 (s. 43C. (2)).

Effect of repeal.

The repeal of former section 43, however, will not impair a right of action which came into existence before the date of the repeal: *Watts* v. *Bucknall* (1903) 1 Ch. 766, 773.

Present section.

Present section.

The new sections, 43-43D passed in 1917 adopt in part the provisions of the Imperial Act and of certain of the Acts of the Provinces of Canada based thereon.

The issuing of a prospectus is not compulsory, but if no prospectus is issued, the company, unless it is a "private company," must issue a statement in lieu of a prospectus in the form set out in Schedule F to the Act before allotting any of its shares, s. 43C (1). If the statement is in the prescribed form and reasonably complete, the fact that some of the particulars set out are inaccurate and incomplete, will not have the effect of avoiding allotments unless the statement is so insufficient as to be illusory and amount to no statement at all: *In re Blair Open Hearth Furnace Co.* (1914) 1 Ch. 390.

Private companies.

For the purpose of s. 43C, a "private company" is one which restricts the right to transfer its shares; limits the number of its members to fifty; and prohibits any invitation to the public to subscribe for any shares or debentures, s. 43C (3).

A private company is not required to file any statement in lieu of a prospectus before allotting shares or debentures. Moreover, sub-section 2 of s. 75, requiring the filing of a consent in writing to act as director

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before a director is appointed, does not apply to private companies.

A private company does not cease to be such merely because the number of its members in fact exceeds fifty: *Park* v. *Royalties Syndicate* (1912) 1 K. B. 330. All that is required is that some restriction on the right of transfer should appear in the letters patent. Where it was provided by the articles that shares should not be transferred without the consent of the directors, it was held that it was not necessary that the consent should be obtained before the execution of the transfer, but that it was sufficient if given prior to the completion of the transaction: *In re Copall Varnish Co.* (1917) 2 Ch. 349, (1918) 87 L. J. Ch. 132. The statement that a shareholder has a right to dispose of his shares, subject to any restrictions in the governing instruments, is as applicable to a private company as to a public company, *ibid.*

Provision is made by sub-section 4 of s. 43C for turning a private company into a public company. Whether the words "subject to anything contained in the letters patent and supplementary letters patent" in this sub-section are intended to prevent a private company from turning itself into a public company, if there is a specific provision against this being done appearing in the letters patent, *quære.* There is no corresponding provision for turning a public company into a private company, but it is submitted that this could be done under the Act by obtaining supplementary letters patent containing the provisions required by sub-section 3. See *Leiser* v. *Popham Bros. Ltd.* (1912) 6 D. L. R. 525.

It should be noted that the Act contains no express provision authorizing the incorporation of private companies. In practice, however, incorporation as a private company can be obtained if a clause is added to the application for incorporation stating that incorporation as a private company is sought and setting out the restriction on the transferability of shares desired to be incorporated in the letters patent.

A prospectus in the popular meaning of the term is a document prepared for one or other or both of two purposes; either for the purpose of complying with the provisions of the Companies Act under which the company is incorporated, or for the purpose of effecting a sale of the company's shares or securities.

S. 43. Prospectus.

Under the Act a prospectus means "any prospectus, notice, circular, or advertisement, or other invitation offering to the public for subscription or purchase any shares or debentures of a company." (s. 43).

What will constitute an invitation to the public would seem to be a question of fact: *Booth* v. *Afrikander* (1903) 1 Ch. 295; *Sherwell* v. *Combined Incandescent Co.* (1907) W. N. 110; 23 T. L. R. 482. In the latter case a prospectus marked "strictly private, not for publication," was sent by directors to their friends. It was held that this was not an offer to the public under s. 4 of the Imperial Act of 1900, such offer being held to be necessarily one by the company to anyone who chooses to subscribe.

S. 43B. Disclosure.

Section 43B does not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or debentures of the company (sub-section (7)). Apparently, however, section 43A does apply to the above excepted cases.

Section 43B applies to every prospectus issued by or on behalf of any person who is or has been engaged or interested in the formation of the company. The section, accordingly, will cover a prospectus issued by a promoter who offers to the public for sale paid up shares allotted to him.

Having regard to the definition in section 43 the term prospectus would seem to apply to a document sent out by a broker who had acquired a block of shares and was seeking by a prospectus to sell shares to the public. But the subsequent section 43B would indicate that the provisions as to disclosure relate only to a prospectus issued by or on behalf of the company itself or by or on behalf of a person who is or has been

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engaged or interested in the formation of the company. If, accordingly, the company makes a private sale of its shares to a broker, the latter, unless he is or was engaged or interested in the formation of the company, would appear to be at liberty to disregard s. 43B on any subsequent sale of shares to the public made by himself and on his own behalf.

If the document used is in the form of a circular which does not make an offer to the public it is not a "prospectus" as defined by s. 43 and therefore there is no obligation to make disclosure under s. 43B.

S. 43B. (1) (*d*). Minimum subscription.

Sub-section (d) does not apply to an issue of bonds: *Burton* v. *Beven* (1908) 2 Ch. 240.

S. 43B (1) (*f*). Vendors.

If the company buys from an absolute owner property which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, the name and address of the vendor and the amount of the consideration must be stated. But where the company's vendor has completed his purchase before the issue of the prospectus, the name of *his* vendor and the consideration on such prior purchase need not be disclosed: *Brookes* v. *Hansen* (1906) 2 Ch. 129.

If the company buys merely the benefit of a contract for the purchase of property, the consideration for which remains undischarged in whole or in part, the company is a " sub-purchaser " and the superior as well as the immediate vendor are "vendors" under the sub-section: *Brookes* v. *Hansen, supra.*

Even where there is no obligation under sub-section (f) to disclose particulars of a purchase, it may still be necessary for the company to give the dates of and parties to the purchase contracts, as being material contracts, under sub-section (k).

S. 43B (1) (*k*). Material contracts.

A material contract is one which upon a reasonable construction of its purport and effect, would assist a person in determining whether he would become a shareholder in the company: *Sullivan* v. *Mitcalfe* (1880) 5 C. P. D. 455.

The provisions for inspection of such contracts indicate that contracts in writing only are covered by the sub-section.

Non-compliance with the statutory requirements of s. 43B is excused under the circumstances set out in sub-section 6. What the "liability" under sub-section 6 may be is not stated. Various suggestions have been made as to the nature of the liability, and the persons by whom it may be enforced, as to which see Halsbury, vol. 5, p. 125, footnote (n).

Non-compliance with the section.

In framing a prospectus it is desirable to include information on a number of matters not provided for by the Act. The following matters in particular should be dealt with in the prospectus:—

Suggestions for the preparation of prospectus.

1. The name of the company should be correctly set out.

2. The authorized share capital should be stated, together with the amount of loan capital, bonds, debentures or debenture stock. If there are different classes or shares, viz., common and preferred, these should be specified, and particulars of rate of dividend on preferred shares and voting rights of common and preferred shares stated, and other details given, and the par value of the shares should likewise be stated.

3. The officers with their addresses and descriptions should be set out, and the bankers, transfer agents, auditors, solicitors, and brokers to the issue named.

4. A short statement of the assets and a summary of past profits should be given if the company has been in operation previously to the issue, or if a business has been taken over by the company.

5. It is well to give a general description of the business the company will carry on.

6. If the prospectus offers bonds or debenture stock for subscription it should be stated that a copy of the opinion of counsel on the legality of the issue is obtainable or available for inspection.

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It is usual for the prospectus to be accompanied by form of application for the shares or bonds offered for subscription.

Liability for statements in prospectuses. S. 43D.

This section adopts the provisions of s. 84 of the Imperial Act of 1908, which have also been adopted by a number of the provinces, and which originally appeared in the Directors' Liability Act, 1890, passed to meet the effect of the decision of *Derry* v. *Peek* (1889) 14 App. Cas. 337. There it was held that in an action of deceit the plaintiff must prove actual fraud, and that a false statement made through carelessness and without reasonable grounds for believing it to be true may be evidence of fraud, but does not necessarily amount to fraud; and further, that such statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit. The practical effect of this decision would have been to leave those deceived by untrue statements in prospectuses without a remedy except where something practically amounting to preconceived and deliberate fraud in the publication of such statements could be shown.

The onus is now placed on the directors and promoters and other persons who have authorized the issue of the prospectus to show reasonable grounds for believing in the accuracy of any untrue statement, and particulars of such grounds will be ordered where this defence is set up: *Almon* v. *Oppert* (1901) 2 K. B. 576.

Caution in drawing prospectus.

In view of the stringent provisions of s. 43D, it is most important for directors, promoters, and others connected with the affairs of a company incorporated or about to be incorporated, that statements, within the meaning of the Act, should be cautiously made. Statements which it is proposed to include in the prospectus, notice or advertisement, or in any report or memorandum appearing on the face thereof, or in any report or memorandum referred to therein or issued therewith, and *not* purporting to be made on the authority of an expert, or of a public official document or

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statement, should be carefully eliminated unless each person who might be held responsible therefor has reasonable grounds to believe, and does believe, that such statements are true.

The uncorroborated statements of a vendor-promoter afford by themselves no reasonable ground for belief in their truth: *Adams* v. *Thrift* (1915) 2 Ch. 21.

And if the statement is one purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an engineer, valuer, accountant or other expert, care should be taken, not only that such statement fairly represents the statement made by such engineer, valuer, accountant or other expert, or is a correct and fair copy of or extract from the report or valuation, as the case may be, but also that there are reasonable grounds to believe that the person making the statement, report or valuation, was competent to make it. In the case of one without personal knowledge on the subject, scant inquiry would scarcely be likely to supply reasonable grounds of belief.

Measure of damages.

The liability imposed by the Act is to pay compensation to persons subscribing for shares or debentures on the faith of the prospectus for the loss or damages they may have sustained by reason of any untrue statement therein. The measure of damages is the difference between the purchase price and the fair value of the shares at the time of allotment: *McConnell* v. *Wright* (1903) 1 Ch. 546; *Shepheard* v. *Broome* (1904) A. C. 342; but if the purchaser does not retain his shares, the measure of damages is the amount paid for them: *Johnson* v. *Johnson* (1913) 14 D. L. R. 756.

If a director, knowing that a prospectus is being issued, does not read it or make any enquiry as to its contents, and gives no notice under sub-section (c) (ii) of s. 43D (1), it is too late for him to repudiate the prospectus if he waits until an action is brought against him for damages for an untrue statement in the prospectus: *Drincqbier* v. *Wood* (1889) 1 Ch. 393.

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Limitation.

The period of limitation within which an action must be brought is six years: *Thomson* v. *Lord Clanmorris* (1900) 1 Ch. 718.

Death of director.

The liability under the section being founded on tort the maxim *actio personalis moritur cum persona* applies, and where a director is a defendant in an action brought under the statute the action will not survive against the executor in the absence of proof that the director's estate benefited by the tort: *Geipel* v. *Peach* (1917) 2 Ch. 108; 86 L. J. Ch. 745.

Contribution.

Sub-section 4 of s. 43D enables a director to recover contribution from any other person who, if sued separately, would have been liable to make the same payment, unless the director who has become so liable, was, and the other was not, guilty of fraudulent misrepresentation. Where a director who is being proceeded against for contribution dies, such contribution can be recovered against his estate: *Shepheard* v. *Bray* (1906) 2 Ch. 235.

Where a director is suing under the sub-section, it is not sufficient to claim merely contribution on account of the judgment obtained against him, and which he has paid. The statement of claim must allege the defendant's responsibility for the issue of the prospectus, that the subscriber applied for the shares on the faith of it, and that he suffered loss by reason of one or more untrue statements therein: *Johnson* v. *Johnson* (1913) 14 D. L. R. 756, 761. And the plaintiff must establish such a case as a subscriber himself would be required to make, if he were suing, *ibid.*

The co-director should be brought in by third party notice: *Gerson* v. *Simpson* (1903), 2 K. B. 197.

Remedies apart from the statute.

The statute does not take away or affect the remedies which subscribers had at common law. In the following note the rights of subscribers who have been induced to take shares by misstatements in a prospectus are considered independently of the statute. The

subject may be conveniently dealt with under the following headings: Sects. 43-43D.

1. What misstatements will entitle a shareholder to relief.

2. The nature of the relief obtainable.
   (1) Action for deceit.
   (2) Rescission.
   (3) Defence to action for calls.
   (4) Criminal liability of directors.

3. Who is entitled to relief?

The duty of those who are responsible for the framing of a prospectus is stated by Lord Chelmsford in *Directors, etc., of the Central Railway Company of Venezuela* v. *Kisch* (1867) L. R. 2 H. L. 99, at p. 113, as follows:

"But although, in its introduction to the public, some high colouring, and even exaggeration, in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking, may be expected, yet no misstatement or concealment of any material facts or circumstances ought to be permitted. In my opinion, the public, who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they chose to convey, that the utmost candour and honesty ought to characterize their published statements. As was said by Vice-Chancellor Kindersley in the case of the *New Brunswick and Canada Railway Company* v. *Muggeridge*, 'Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous

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accuracy and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.' ''

1. What misstatements will entitle a shareholder to relief.

The misstatement must be one of fact and not merely of law: *Beattie* v. *Lord Ebury* (1872), 7 Ch. 777. Nor a mere statement of intention: *Edgington* v. *Fitzmaurice* (1885) 29 Ch. D. 459.

It must be material and have induced the shareholder to purchase the shares, *e.g.*, where a company alleged that it had, where in fact it had not, the privilege of selecting a ''compact choice tract of land'' for the purposes of settlement free from the use of intoxicating liquors, that was a material representation: *Temperance Colonization* v. *Fairfield* (1889) 16 O. R. 544. See also *Howard* v. *Canadian, &c., Co.* (1914) 6 O. W. N. 285, 404.

Both materiality and whether the subscriber was induced to act on the misrepresentation are questions of fact: *Young* v. *Smith* (1915) 21 D. L. R. 97, 8 A. L. R. 256. In that case the following statement from Halsbury, vol. 20, p. 699, was adopted: ''It is sufficient to prove that in the ordinary course of events the natural and probable effect of the misrepresentation was to influence the mind of a normal representee in the manner alleged''; a representation that other shareholders had paid cash for their shares was held material, *ibid.*

A misrepresentation made on a previous purchase of shares can be relied on where it remains uncorrected when the subscriber subsequently takes a further block of shares still relying on the truth of the original misrepresentation: *Fitzherbert* v. *Dominion Bed Mfg. Co.* (1915) 23 D. L. R. 125, 21 B. C. R. 226.

Where misrepresentation by non-disclosure is alleged it is not sufficient merely for the shareholder

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to say that if he had known the fact withheld he would not have taken the shares. He must go further and specify the particular statement which is inconsistent with the truth: *In re Christeneville Rubber Estates, Ltd.* (1911) 81 L. J. Ch. 63.

Non-disclosure of a matter arising after the issue of a prospectus is insufficient and will not entitle a shareholder to relief in an action for deceit: *Petrie* v. *Guelph Lumber Co.* (1885) 11 S. C. R. 450. In the last mentioned case partners carrying on a lumber business sold the assets to a new company and issued a prospectus for the sale of the new company's shares. It was alleged by the plaintiffs that the fact of a mortgage of the assets of the old company having been given to the old company's bankers after the issuing of the prospectus, but before stock was issued to subscribers, had not been disclosed. It was held that the mortgage having been given after the prospectus was issued could not have been mentioned in the prospectus and moreover that the shareholders had not suffered damage by such non-disclosure as the new company would have been liable for the old company's debt whether the mortgage had been given or not. For an example of representations not entitling a subscriber to recovery of payment made for shares, see *Kennedy* v. *Acadia Pulp and Paper Mills Company, Limited* (1905) 38 N. S. R. 291.

The misstatement must furthermore have been acted upon, *i.e.*, the shareholder must have been misled and must have been induced by the misstatement to take the shares. The shareholder's loss must have been attributable to the misstatements and he must have relied on such misstatements, per Lord Blackburn in *Smith* v. *Chadwick* (1884) 9 A. C. 187.

2. The nature of the relief obtainable.

(1) Action for deceit.

The distinction between the action for rescission of a contract to take shares and the action for deceit

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is discussed in *Petrie* v. *Guelph Lumber Co.* (1885) 11 S. C. R. 450. Our Courts have held that when the action is one for deceit the clearest evidence of misrepresentation must be given: *Petrie* v. *Guelph Lumber Co., supra; Beatty* v. *Neelon* (1885) 12 A. R. 50, 13 S. C. R. 1; and that long delay on the part of the plaintiffs and their conduct in their dealings with the subject matter might disentitle them to relief. *Ib.*

Under the general law an action of deceit lies for misrepresentation in prospectuses, etc., upon the faith of which persons are induced to take shares in a company to their loss. It would seem that, to support the action for deceit, there must be same misstatement of fact, or, at least, such a partial statement of fact that the omission to state that which is not disclosed renders that which is stated absolutely false: *Peek* v. *Gurney* (1873) L. R. 6 H. L. 403. And see per Lord Watson, in *Aaron's Reefs* v. *Twiss* (1896) A. C. 273, at p. 287. The responsibility of those who issue a prospectus containing such misrepresentations may not extend to a transferee of shares.

The measure of damages is the difference between the actual value of the shares at the date of the allotment and the amount paid by the shareholder: *Peek* v. *Derry* (1888) 37 Ch. D. 541 at p. 594. See also *McLeay* v. *Tait* (1906) A. C. 24.

The fraud, if any, is on the part of particular individuals, and the action is against them. At the same time, a company may be liable for the wrong of its servant by virtue of the well known principles of the law of agency, and no distinction can be drawn between an injury inflicted by reason of fraud on the part of the agent, and an injury caused by any other tort committed by him, per Lord Selborne: *Houldsworth* v. *City of Glasgow Bank* (1880) 5 App. Cas. 317 at p. 326. And see *New Brunswick, etc., Ry. Co.* v. *Conybeare* (1862) 9 H. L. C. 711, at pp. 725 and 740; *Western Bank of Scotland* v. *Addie* (1867) L. R. 1 H. L. (Sc.) 145, 157.

A claim for damages against directors under section 43 as well as a claim for deceit and a claim against

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the company for rescission may be combined in one action: *Frankburg* v. *Great Horseless Carriage Company* (1900) 1 Q. B. 504, C. A.

Fraud is an essential element and must be proved to enable the plaintiff to recover: *Derry* v. *Peek* (1889) 14 App. Cas. 337.

The clearest evidence of misrepresentation is required: *Petrie* v. *Guelph Lumber Company* (1885) 11 S. C. R. 450; *Beatty* v. *Neelon* (1885) 12 A. R. 50; (1887) 13 S. C. R. 1. See also *Clark* v. *Gray* (1902) 1 O. W. R. 370.

If the statement complained of was believed in by the directors, even if such belief was based on unreasonable grounds, the action fails. The statement must be shown to have been made dishonestly: *Angus* v. *Clifford* (1891) 2 Ch. 449, and see also *Petrie* v. *Guelph Lumber Company, supra.*

It is furthermore necessary for the plaintiff to fix the defendant with responsibility for the prospectus: *Farrell* v. *Manchester* (1908) 40 S. C. R. 339, and the fact that the directors had employed a broker to sell shares, in the absence of proof that they knew of the use of the prospectus containing the misstatements complained of before the sale of shares thereunder to the plaintiff, was insufficient to fix them with liability.

(2) **Rescission.**

Rescission.

In an action for rescission, just as in the action for deceit, it is necessary to prove that the misrepresentation complained of was material, that the plaintiff acted thereon and that he suffered damage. On the other hand it is not necessary to prove that the misstatement was made with intent to deceive. The distinction between the two remedies is discussed in *Petrie* v. *Guelph Lumber Co.* (1895) 11 S. C. R. 450. See also *Abrey* v. *Victoria Printing Co.* (1912) 21 O. W. R. 444, which was an action for rescission of a subscription or stock and the recovery back of the amount paid thereon. A divisional court, adopting the wording used in *Angel* v. *Jay* (1911) 1 K. B. 666, held that

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"misrepresentation is no ground for setting aside an executed contract, unless such misrepresentation would be not only sufficient ground in equity for rescission of an executory contract, but also is deceitful in contemplation of a court of law." Accordingly if the contract to take shares is completely executed and the shareholder has paid his shares up in full he may find himself incompetent to rescind. This is the result of the above case, but it appears to be in conflict with *Farrell* v. *Manchester* (1908) 40 S. C. R. 339, when a shareholder who had paid his shares up in full was held entitled to rescind.

The action to rescind must be brought against the company, and accordingly the plaintiff must prove that the misstatement was made by someone having authority to bind the company, or that the prospectus in which the misstatement occurred was the act of the company. Thus in *Farrell* v. *Manchester, supra,* the misstatement in question had been made by a broker, who had been employed to sell the shares and had prepared the prospectus. It was held that the prospectus having been proved to be the act of the company the plaintiff was entitled to rescind and it was further held to be immaterial that the prospectus was marked "private." For a discussion of the circumstances which will fix a company with responsibility for a document purporting to be the prospectus of the company, see *French Gas &c. Co.* v. *Desbarats* (1912) 1 D. L. R. 136.

A prospectus for which the company is not in the first place responsible may become the act of the company if it is adopted by the latter. This may occur when the prospectus was issued prior to incorporation and the company has in effect adopted it by allotting the shares subscribed for: *Buff Pressed Brick Co.* v. *Ford* (1915) 33 O. L. R. 264, *Karberg's Case* (1892) 3 Ch. 1.

In such cases there may be a remedy against the company as well as against the promoters. "Speaking generally, there is no doubt that a misrepresenta-

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tion, in order to vitiate a contract, must be made by a party to it, or by his agent. But this rule is not without exception: *Stewart's Case* (1866) L. R. 1 Ch. 574, and *Downes* v. *Ship* (1868) L. R. 3 H. L. 343, warrant the proposition that an application to a company, when formed, for shares based upon a prospectus issued by the promoters of the company before its formation, cannot be dissevered by the company from such prospectus," per Lindley, L.J., in *Karberg's Case* (1892) 3 Ch. 1, at p. 13. It should be borne in mind that this case was one for rescission. See further *Henderson* v. *Lacon* (1867) L. R. 5 Eq. 249; *Peek* v. *Gurney* (1874) L. R. 6 H. L. 377; *Re Denham* (1883) 25 Ch. D. 752; *Tamplin's Case* (1892) W. N. 94, 146.

The company may be responsible for misstatements in a prospectus even though the document was prepared without authority. The grounds of liability (which also include those discussed above) are summarized in *Lynde* v. *Anglo-Italian Hemp Spinning Company* (1896) 1 Ch. 178, by Romer, J., at p. 182 as follows:—

Grounds of liability.

"Speaking generally, to make a company liable for misrepresentations inducing a contract to take shares from it the shareholder must bring his own case within one or other of the following heads:—

(1) Where the misrepresentations are made by the directors or other the *general* agents of the company entitled to act and acting on its behalf — as, for example, by a prospectus issued by the authority or sanction of the directors of a company inviting subscriptions for shares;

(2). Where the misrepresentations are made by a *special* agent of the company acting within the scope of his authority as, for example, by an agent specially authorized to obtain, on behalf of the company, subscriptions for shares. This head, of course, includes the case of a person constituted agent by subsequent adoption of his acts;

(3). Where the company can be held affected, before the contract is complete, with *the knowledge that it is induced by misrepresentations*—as, for example, when

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the directors, on allotting shares, know, in fact, that the application for them has been induced by misrepresentations, even though made without any authority;

(4). Where the contract is made on the *basis of certain representations,* whether the particulars of those representations were known to the company or not, and it turns out that some of those representations were material and untrue—as, for example, if the directors of a company know when allotting that an application for shares is based on the statements contained in a prospectus, even though that prospectus was issued without authority or even before the company was formed, and even if its contents are not known to the directors." The italics are ours.

Misrepresentation by expert.

A good example of rescission for misstatements not made by directors nor known by them to be untrue is to be found in *Re Pacaya Rubber & Produce Co.* (1914) 1 Ch. 542, where it was held that a shareholder was entitled to rescission on the ground of misrepresentations made by an expert and appearing in his report which formed part of the prospectus. The directors were not aware of the untruthfulness of the statements contained in the report, but it was held that in order to protect the company from liability it should have expressly dissociated itself from all responsibility for the truthfulness of all statements contained in the report.

The right to rescind involves a repudiation on the part of the plaintiff of the relation of shareholder and accordingly he may not retain his shares and sue for damages: *Houldsworth* v. *City of Glasgow Bank* (1880) 5 App. Cas. 317.

Misrepresentations by agents—examples.

Misrepresentation must be of an existing fact, not as to what may be reasonably expected to take place: *Modern Bedstead Co.* v. *Tobin* (1908) 12 O. W. R. 22-25.

A representation that dividends were guaranteed by another company was material: *McCallam* v. *Sun &c. Co.* (1902) 1 O. W. R. 226.

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A fraudulent representation by the agent that the company would commence business within a certain time entitled the subscriber to rescind: *International Casualty* v. *Thompson* (1913) 48 S. C. R. 167.

See also on misrepresentation by agents: *Howard* v. *Canadian Automatic Co.* (1914) 6 O. W. N. 285, 404.

What purports to be a mere expression of opinion by an authorized agent may be false and fraudulent so as to constitute a ground for rescission if the statement is relied on: *Pioneer Tractor* v. *Peebles* (1914) 18 D. L. R. 477.

A representation by an agent which amounts to a *simplex commendatio* unless made in bad faith is not a ground for rescission: *Northwest Battery* v. *Hargreaves* (1913) 23 Man. L. R. 923.

Loss of right to rescind.

A contract to take shares induced by misrepresentation contained in a prospectus is not void but voidable only; it is valid until repudiated and the subscriber may lose the right to repudiate in various ways. Thus, if after having obtained knowledge of the facts he does something indicating affirmance of the contract: *Re National Husker Co., Worthington's Case* (1913) 10 D. L. R. 643, 4 O. W. N. 1077; (1914) 14 D. L. R. 696, *e.g.* if he attends meetings or attempts to sell his shares, pays calls or otherwise shows that he regards himself as a shareholder. See *Petrie* v. *Guelph Lumber Co.* (1885) 11 S. C. R. 450.

Affirmance.

If the subscriber, by his actions has elected to affirm the contract he loses the right to set it aside: *Ward* v. *Siemon* (1918) 43 O. L. R. 113, 118 and cases cited.

The fact of a person seeing a prospectus wherein a company makes certain statements, which if true would affect such person's rights, and of not proceeding immediately to protest against such statements is no proof of acquiescence in such statements and of ratification of the acts or deeds therein described: *Consumers' Cordage Co.* v. *Molson* (1912) 2 D. L. R. 451.

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Delay.

The commonest example of loss of the right to rescind is to be found in delay by the shareholder. He must proceed promptly after the misrepresentation is brought to his notice. In *Scottish Petroleum Co.* (1883) 23 Ch. D. 413, it was suggested that a delay of a fortnight might be too long. In *Central Venezuela Railway Co.* v. *Kisch* (1867) 2 H. L. 99, a delay of two months did not disentitle the shareholder to relief when time for investigation on his part had to be allowed for. The delay in *Morrisburgh* v. *Ottawa* (1913) 34 O. L. R. 161, was for two years and the shareholder was held to be too late. See also *Robert* v. *Montreal Trust Co.* (1918) 56 S. C. R. 342; 41 D. L. R. 173. In *Nelles* v. *Ontario Investment Association* (1889) 17 O. R. 129, a number of years intervened between the date of the subscription and the date of the action, but the plaintiff not having become aware of the untruthfulness of the misstatements until shortly before the action was entitled to recover. It was also held that the fact that the plaintiff had sold some of his shares did not prevent rescission as to the balance.

The result of the authorities would appear to be that it is a question of fact in each case whether there has been undue delay, and the only safe course for the subscriber is to repudiate with the utmost promptness on discovery of the misrepresentation, otherwise his rights may be lost. The same results do not follow from delay in bringing an action after repudiation has taken place. In *Farrell* v. *Manchester* (1908) 40 S. C. R. 339, it was held that at any rate when the shares are fully paid up a delay of almost a year between repudiation and the bringing of the action did not disentitle the shareholder to relief. And when no change occurs in the status of the company on the interval between subscription and the bringing of the action, delay by the shareholder in ascertaining his rights has been held not to be a bar: *Pioneer Tractor Co. Ltd.* v. *Peebles* (1914) 15 D. L. R. 275, 18 D. L. R. 477. The right to rescind is furthermore lost by the commencement of a winding-up before the action is

brought: *Re Scottish Petroleum Company* (1883) 23 Ch. D. 413; *Reese River, &c., Co.* v. *Smith* (1869) L. R. 4 H. L. 64; *St. Roch Hotel* v. *Barbeau* (1915) 48 Que. S. C. 94; but not by the company's having got into financial difficulties short of liquidation: *Fitzherbert* v. *Dominion Bed* (1915) 23 D. L. R. 125, 21 B. C. R. 226.

The reason why a winding-up destroys the right to rescind is because after a winding-up the shareholder's liability becomes a statutory liability to contribute the amount unpaid on his shares. See s. 51 of the Winding-up Act. And other rights, viz., those of creditors and contributories intervene so that rescission is no longer possible: *Tennent* v. *City of Glasgow Bank* (1879) 4 App. Cas. 615. But in *Re Western Fire Insurance Co.* (1915) 22 D. L. R. 19 the Supreme Court of Alberta held that an unequivocal repudiation where the subscriber was entitled to repudiate, was sufficient without the further step of bringing proceedings to set aside the subscription before a winding-up. The court further held that it was not bound by *Re Scottish Petroleum Co., supra.*

If suit is brought before the winding-up order is made the plaintiff may be authorized on motion to continue his action after the order is made: *Johnston* v. *Ewart* (1907) 31 Que. S. C. 336. And if the shareholder has counterclaimed for rescission in an action by the company for calls he may raise in the winding-up all the defences which would have been open to him in the action: *Re Pakenham* (1904) 6 O. L. R. 582.

Although the subscriber may have had a good defence against the company, *e.g.* that his subscription was induced by fraud and that he had never received any notice of allotment, by giving in payment of his shares a promissory note to the company which the latter has endorsed to a holder in due course, he may be liable to the holder on the note: *Standard Bank* v. *Stephens* (1908) 11 O. W. R. 582.

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(3) **Defence to an action for calls.**

Material misrepresentations.

A shareholder may put forward as a defence to an action by the company for calls the fact that his subscription was induced by material misrepresentations in the prospectus provided he has repudiated his shares and has not done anything to show that he has assumed the status of a shareholder. See Halsbury, vol. 5, p. 127 and cases there cited: *Boeckh* v. *Gowganda* (1911) 24 O. L. R. 293 affirmed (1912) 46 S. C. R. 645 and *Buff Pressed Brick Co.* v. *Ford* (1915) 8 O. W. N. 63, where the defence failed owing to the fact that the shareholder signed the petition for incorporation: see also *Silliker Car Co.* v. *Donahue* 44 N. S. R. 315; *Provincial Insurance* v. *Brown* (1860) 9 U. C. C. P. 286; *Canada Food Co.* v. *Stanford* (1916) 28 D. L. R. 689 (representation not material.)

The company will also be bound by material representations of an agent authorized to solicit subscriptions for shares and it is immaterial whether the representations were made in good faith or not: *Ontario Ladies' College* v. *Kendry* (1905) 10 O. L. R. 324. A statement that other named persons have subscribed for a considerable amount is a material representation, *ibid.*

Where the statements in a prospectus of a projected company do not correspond in a material particular, *e.g.* capitalization, with the facts as they exist after incorporation, a person who has agreed to take shares in the proposed company is not liable in the absence of acquiescence or laches: *Stevens* v. *London Steel Works Company, Delano's Case* (1888) 15 O. R. 75.

Statement of illegal intention.

Where a prospectus stated that common shares remaining in the treasury would be available for a 50 per cent bonus if it was determined to issue the balance of the company's authorized preference shares, it was held that this being no more than a statement of intention to do something which the company would be unable to carry out and there being no contract that the shares would be issued or the bonus

paid, this was not a ground on which the subscriber could obtain relief: *Forget* v. *Cement Products* (1916) 28 D. L. R. 717 P. C.

(4) **Criminal liability of directors.**

Directors may be criminally liable under Section 444 or the Criminal Code for false statements inserted by them in a prospectus. See also section 407 (a) of the Code.

3. Who is entitled to relief.

It is ordinarily only the original subscriber and not a transferee from him who is entitled to rescission or damages for misrepresentation contained in a prospectus.

In order that such transferee may maintain an action for deceit in respect of loss occasioned by his belief in the prospectus and his consequent taking of shares, it would seem that he must shew some connection between the persons responsible for the prospectus and himself in the communication of the prospectus and its influence upon his conduct in becoming an allottee: *Peek* v. *Gurney* (1873) L. R. 6 H. L. 403. But where the object of the prospectus is not merely to induce application for an allotment of shares but also to induce persons to purchase shares in the market, a person who takes a transfer of shares on the faith of such prospectus and thereby sustains a loss, will have his remedy against those who are responsible for the issuing of the prospectus: *Andrews* v. *Mockford* (1896) 1 Q. B. 372. This case is apparently a relaxation of the rule laid down in *Peek* v. *Gurney* (which decision overruled many previous authorities), that when the allotment is completed the office of the prospectus is exhausted, and that a person who is not an allottee but a subsequent purchaser in the market is not so connected with the prospectus as to render those who issued it liable to him for his loss. It illustrates the fact that apart from the statutory definition

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of prospectus, there is in commercial phraseology a wider meaning attached to the term that comes within the general law of 'deceit.'

A shareholder is not entitled to relief if he was a petitioner for incorporation and signed the memorandum of agreement which accompanies the petition. On the granting of the charter he becomes a shareholder and cannot repudiate his liability: *Bergeron* v. *Jonquière* (1913) 22 Que. K. B. 341.

In *Buff Pressed Brick Co.* v. *Ford* (1915) 8 O. W. N. 63 the Appellate Division of the Supreme Court of Ontario in coming to the same conclusion held that any misrepresentation made is the act of a promoter, not the company; the company not being in existence, cannot make any misrepresentation. The shareholders' rights, if any, are against the promoters and an additional ground for refusing relief to an incorporator is that, by signing the memorandum of agreement, he becomes bound not only as between himself and the company but also as between himself and others who become shareholders: *In re Metal Constituents, Limited* (1902) 1 Ch. 707. It was suggested in *Bergeron* v. *Jonquière* (1913) 22 Que. K. B. 341 at p. 352, that the shareholder might also have a right of action to rescind the subscription contract, *i.e.*, an action to dissolve the relation between the shareholder and the company. This failed in that case because the plaintiff had not shown that his grievances had been disregarded by those in control of the company. But in view of *In re Metal Constituents, Limited, supra*, it is difficult to see how the right of action suggested in *Bergeron* v. *Jonquière* can exist.

PROMOTERS.

Meaning of the term.

The Act, except for the purpose of s. 43D, contains no definition of the word 'promoter' and judges have refrained from limiting the scope of the term by defining it. As Bowen, C. J., said in *Whaley Bridge* v. *Green* (1880) 5 Q. B. D. 109, at p. 111, it

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is 'a term not of law but of business, usefully summing up in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence''; and Lindley, C. J., in *Lydney and Wigpool Co.* v. *Bird* (1886) 33 Ch. D. at page 93 observed, "The word promoter is ambiguous and it is necessary to ascertain in each case what the so-called promoter really did before his liabilities can be accurately ascertained." The state of being a promoter is not a definite legal status, such as that of a shareholder or a director to which the law annexes certain rights and burdens. While then the word does not admit of exact definition there is no practical difficulty in identifying as a promoter the person who is responsible for "getting up" the company, who negotiates the preliminary agreements, instructs solicitors as to the provisional directors, etc. See *Lydney and Wigpool Co.* v. *Bird* (1886) 33 Ch. D. 85. It is in every case, however, a question of fact whether a man by his acts has constituted himself a promoter, and if so to what extent: *Emma Silver Mining Co.* v. *Grant* (1879) 11 Ch. D. 918.

The nearest approach to any established general principle resulting from the condition of being a promoter is that rule of law which prohibits any one engaged in the promotion of an incorporated company from deriving any secret advantage from his position. See *Re Hess* (1894) 23 S. C. R. 644.

It has been held that a solicitor who acts for the company in its early stages even if he allows his name to be printed on the prospectus is not a promoter (1883) *Great Wheal Polgooth* (1883) 53 L. J. Ch. 42, 49 L. T. 20. A man may be a promoter without actually being the person who forms the company, and in *Emma Silver Mining Co.* v. *Lewis* (1878-9) 4 C. P. D. 396, it was held that there had been evidence to go to the jury, and the latter's finding that the defendants were promoters was left undisturbed, where it was shown that the defendants arranged with the owner to assist in selling a mine to a company to be formed

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by him, and while they helped him to sell the mine let him form the company, fix the price and arrange the details of sale; they also permitted themselves to be appointed metal brokers of the company at a remuneration, failed to disclose to the company facts within their knowledge detrimental to the reputation of the mine, and received part of the purchase price as an undisclosed profit. See also the *Emma Silver Mining Co.* v. *Grant* (1879) 11 Ch. D. 918, for what acts will constitute promotion. It will not avail the real promoter to interpose a nominal promoter and so attempt to avoid responsibility and Phillimore, J., held, in *Re Oarby, ex parte Brougham* (1911) 1 K. B. 95, that where the nominal promoter was a corporation, which was a mere "alias" for two individuals, the latter were the real promoters and liable as such.

Application of the Act.

No liability was imposed on promoters as such for non-compliance with the requirements of s. 43 as it stood before the amendment of 1917; and unless promoters were also officers of the company who knowingly issued a prospectus or notice which omitted the required particulars they were not affected by the section.

The present section, 43D, imposes the same liability on promoters for mis-statements in the prospectus as is imposed on the directors, as to which see the notes to this section, *supra.* For the purpose of s. 43D, the meaning of the term "promoter" is limited to "a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement," sub-sec. 5.

In the following note there is considered the liability of promoters, to the company or to other persons, independently of this section of the Companies Act.

Relation of promoters to company.

Fiduciary relationship of promoters towards company.

Promoters of a company stand in a fiduciary relationship to the company which they bring into existence. Their position as promoters gives them an

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extensive power and influence in shaping and controlling the affairs of the company which is subsequently created, and it is because of their possession of such power and influence that a fiduciary relationship is deemed to be established. This is in accord with the well settled principles of equity which impress such a character upon the relationship subsisting between two persons when one of them is in a position to exercise a controlling influence over the mind or actions of the other. The principle as applied to the promoters of a company, was first clearly enunciated in the case of *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218.

This relationship exists as soon as the company is formed, and it would seem that a promoter will be deemed to have acted in that relationship from the moment he begins to promote or act on behalf of the company he is about to promote. There is a distinction between a trust for a company of property acquired by promoters and afterwards sold to the company, and this fiduciary relationship which exists between the promoters and the company. The fact that a person buys property with the intention of afterwards selling it to a company does not *ipso facto* make him a promoter, and even though he contemplates the formation of a company, his subsequently promoting it does not make him retrospectively a promoter. See *Gover's Case* (1875) 1 Ch. D. 182, and *Erlanger* v. *New Sombrero Co., supra.* And *Re Hess* (1895) 25 S. C. R. 644. See also Machen on Corporations, Vol. 1, secs. 364, 365 and 366.

As a practical result of the fiduciary relationship between the promoter and the company the former is not entitled to make a profit at the expense of the latter; or if he does not make a profit, in order to retain it he must make full disclosure to the company. In *Bennett* v. *Havelock Electric Light and Power Co.* (1910) 21 O. L. R. 120, where each of four promoters received from the vendor a portion of the purchase price and the payment was not disclosed, they were held bound to account for it to the company. See also

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Re British Seamless Paper Box Co. (1881) 17 Ch. D. 467, and *Stratford &c., Co.* v. *Mooney* (1910) 21 O. L. R. 426. The promoter must disclose the fact that he is the real vendor to the company if such is the case: *Leeds & Hanley Theatres of Varieties* (1902) 2 Ch. 809.

The promoter who is making a profit out of his dealings with the company should furthermore provide it with an independent body of shareholders or board of directors who will protect the company in its dealings with the promoter: *Gluckstein* v. *Barnes* (1900) A. C. 240; at any rate where the public are to be invited to subscribe; for disclosure to a board of directors who are the mere nominees of the promoter, the board room being occupied by the enemy, as was said in the last mentioned case, is obviously a farce; *Bennett* v. *Havelock* (1910) 21 O. L. R. 120 at p. 130 and see *Stratford & Co.* v. *Mooney* (1910) 21 O. L. R. 426 at pp. 443 and 445. Where, however, there was no concealment and no secret profit and the company's articles of association expressly provided that it should acquire the asset at the price named, even though the promoters had not provided the company with an independent board, the company could not make the promoters account for their profit: *Omnium Electric Palaces, Limited* v. *Baines* (1914) 1 Ch. 332.

Where all the members of the company know the facts and approve of the transaction, and there is to be no public issue of shares such a course need not be followed, *for volenti non fit injuria, Salomon* v. *Salomon* (1897) A. C. 22. And in *Attorney-General for Canada* v. *Standard Trust Co. of New York* (1911) A. C. 498, where the incorporating Act of a railway company authorized the purchase of certain assets, and all the persons interested in the capital of the company concurred in the purchase with the full knowledge of the facts, it was held that the promoters were entitled to retain a profit made by them on the sale of such assets to the company, though there had been no independent board provided.

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If a promoter fraudulently obtains an illicit profit on a sale of property to the company without making full disclosure he will be compelled to relinquish it: *Gluckstein* v. *Barnes* (1900) A. C. 240. Where the profit takes the form of paid-up shares of the company the certificate may be cancelled: *Fire Valley Orchards* v. *Sly* (1913) 17 D. L. R. 3, 20 B. C. R. 23. So if a promoter has purchased property for the company from a vendor who is to be paid by the Company when formed, and, by a secret arrangement with the vendor, a part of the purchase price when the agreement is carried out comes into the hands of the promoter, that is a secret profit which he can not retain: *Re Hess* (1894) 23 S. C. R. 644; *Crawford* v. *Bathurst Land &c., Co.* (1918) 42 O. L. R. 256, 270, 271, reversed; *sub nom. Fullerton* v. *Crawford,* 50 D. L. R. 457. See also *Fire Valley Orchards* v. *Sly* (1913) 17 D. L. R. 3, 20 B. C. R. 23; *Alexandra Oil, &c., Co.* v. *Cook* (1908) 11 O. W. R. 1054; and (1909) 13 O. W. R. 405; 14 O. W. R. 604. The remedy in such a case being damages it is available though rescission may have become impossible: *Leeds and Hanley Theatres of Varieties* (1902) 2 Ch. 809.

Promoter selling property acquired while he is a promoter.

It has been said in a Canadian case that if the promoter acquires property after he has become a promoter and resells to the company he cannot retain any profit made on such resale, and that the company is entitled to say that the promoter acquired the property as agent or trustee for the company and disclosure will not help him. Thus, where the vendor company was actively promoting the plaintiff company at the time when the former sold certain assets to the latter, the plaintiff company was held entitled, in the absence of waiver of its rights, to treat the vendor as acquiring the assets for it and to take them at cost price notwithstanding disclosure: *Graham*

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Island Collieries v. *Canadian Development Co. et al* (1913) 12 D. L. R. 316. That case proceeded on the statement of the law in Palmer, 10th ed., Pt. I., p. 118, 11th ed. pp. 132, 133, which was criticized by Sargant, J., in *Omnium Electric Palaces* v. *Baines* (1914) 1 Ch. 332 at p. 347, where he said, "Whether promoters are in fact acquiring any assets as trustees for a company, must, in my judgment be a question of fact; and when, as here, the whole scheme has throughout been that they are to sell to the intended company at a profit the assets which they are acquiring, the natural inference of fact is that, *qua* those assets, they are not intending to be trustees for the company, but are intending to occupy the relationship to the company of vendors." In affirming the judgment of Sargant, J., however, in the Court of Appeal, Cozens Hardy, L.J., at p. 349, and Swinfen Eady, L. J., at p. 355, said that the defendants had acquired an interest in the asset in question before promotion had commenced. See also Phillimore, L. J., at p. 356, and *Leeds & Hanley Theatres of Varieties* (1902) 2 Ch. 809, at p. 822. The true position appears to be that it is a question of fact in every case whether the promoter acquired the property as a trustee for the company or not.

Property already acquired.

Where the promoter has already acquired property before the fiduciary relationship between him and the company has arisen it is clear he is not debarred from making a profit on a resale to the company merely because he happens to promote it. In *Highway Advertising Co.* v. *Ellis* (1904) 7 O. L. R. 504, the defendants acquired a patent before the incorporation of the company and before they became promoters of it. The patent was then sold to the company and Moss, C. J. O., in holding that the defendants were entitled to retain the consideration they had received, said that it would have been immaterial if the defendants had acquired their interests without consideration so long as these had not been acquired for the company. See also Osler, J.A., in *In re Hess* (1891) 21 A. R. 66

and 67, and *Ruethel Mining Co.* v. *Thorpe* (1907) 9 O. W. R. 942, which was a case of a director.

If a promoter acquires property with the intention of reselling it to a company promoted by him he should provide the company with an independent board, and if he fails to do so the contract may be rescinded provided the parties can be restored to their original positions: *In re Hess* (1894) 23 S. C. R. 644 at p. 667. Absence of disclosure, also, will enable the company to rescind. Rescission, however, having become impossible, which will frequently be the case, the company may be left without a remedy, unless fraud or misrepresentation on the part of the promoter can be proved. Where a promoter was one of the members of a syndicate who purchased property and then formed a company to acquire it, and being a director of the company voted for the purchase of the property without disclosing his interest, Wright J., in *Re Lady Forrest & Co., Ltd.* (1901) 1 Ch. 582, held that, in the absence of fraud or misrepresentation, while the company might have rescinded, it could not demand repayment of the profit. It was further held that the prospectus stating that the directors of the syndicate were directors of the company was a disclosure that some profit was being made. In this case *Gluckstein* v. *Barnes* (1900) A. C. 240, was distinguished on the ground that there had been promotion from the outset and that the element of fraud had been present which was wanting here. When, on the other hand, the prospectus prepared with the privity of the vendor-promoters did not disclose the fact that they were the real vendors of property sold by them at a profit through the medium of a trustee, the promoters were held liable in damages to the company: *Leeds & Hanley Theatres of Varieties* (1902) 2 Ch. 809 (C. A.). The measure of damages is the difference between the true value of the property and the selling price to the company, *ibid.* Vaughan Williams, L.J., at p. 826, considered that the promoters were entitled to have the promotion expenses deducted in their favor.

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As to the liability of promoters of a company (who are also directors) to refund gifts made to them by a vendor out of his profit on the sale of assets to the company, see *Crawford* v. *Bathurst Land, &c., Co.* (1916) 37 O. L. R. 611; (1918) 42 O. L. R. 256; (1920) 50 D. L. R. 457.

Preliminary expenses and services performed before incorporation.

By preliminary expenses are meant those connected with the formation and organization of the company, such as the fee paid to the department of the Secretary of State on the issuance of the letters patent, the costs in connection with the preparation of the petition for incorporation, the holding of organization meetings, the drawing of preliminary agreements, the preparation of the prospectus, the printing of share certificates, and the purchase and entering up of the books required to be kept by the company. Many of these items of expense will, and some of them must, be incurred before the company which benefits thereby comes into existence. The promoters or other persons who make disbursements or incur liabilities for a company to be formed must either intend to be personally responsible, or else, if they expect the company to reimburse them, it amounts to very much the same thing; they are attempting to contract as agents for a non-existing principal and the company when it comes into existence is not bound to reimburse them or assume any of their liabilities: *English and Colonial Produce* (1906) 2 Ch. 435; *Rotherham Alum Co.* (1884) 25 Ch. D. 103. It is usual to insert among the company's powers a clause to the effect that it may pay preliminary expenses, and while there is nothing to prevent the company from doing so, the existence of such a power without more will not enable a promoter to claim repayment of his outlay: *Empress Engineering Co.* (1881) 16 Ch. D. 125. The promoter must prove a new, express contract by the company after formation to reimburse him: *English and Colonial Produce Co.* (1906) 2 Ch. 435, or some facts must

exist from which the Court can infer such an agreement: *Van Hummell* v. *International Guarantee Company* (1913) 10 D. L. R. 306.

The principle applies to incorporation fees paid to the department as well as to other expenses: *Clinton's Claim* (1908) 2 Ch. 515. Where a company is incorporated by private Act, it is not liable for the expenses of procuring incorporation in the absence of agreement or a provision in the Act that the Company shall be liable: *Crown Mutual Hail Insurance Co.* (1908) 18 Man. L. R. 51. This case is also important as regards the position of solicitors, since it was held that these have no equitable claim against the company for the costs of procuring the passing of the Act. However, the company having already made a payment to its solicitors on account of costs they were permitted to appropriate such payment to pre-incorporation costs. Even if the Act should contain the usual provision for payment of preliminary expenses solicitors retained by a promoter would have no direct claim against the company for such services: per Mathers, J., *ibid.*, at p. 53, citing *Wyatt* v. *Metropolitan Board of Works* (1861) 11 C. B. N. S. 744, and *Re Skegness* (1889) 41 Ch. D. 215. Similarly where a promoter has performed services before incorporation he is not entitled to be indemnified in the absence of a new agreement: *Van Hummell* v. *International Guarantee Company* (1913) 10 D. L. R. 306.

A promoter cannot sue a co-promoter for remuneration for such services in the absence of express agreement, *ibid.* See also *Holmes* v. *Higgins* (1822) 1 B. & C. 74, and *Patterson* v. *Brown* (1905) 6 O. W. R. 204. Somewhat similar in principle is the case of *McNeil* v. *Fultz* (1907) 38 S. C. R. 198. There the plaintiffs were transferring mining properties to the defendant, a promoter, who was to give them a proportionate share of the bonds and shares to be obtained by him on the flotation of a company being formed to consolidate these with other properties. The promoter, to enable him to carry one of the properties affected by the con-

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solidation, was forced to borrow money from a third person, and, in order to obtain the loan was obliged to hand over to the lender a portion of the securities of the new company which he obtained in consideration of the transfer to it of the various properties. The promoter, accordingly, made a rateable deduction, which he did not declare, from the amount of the bonds he was to deliver to the plaintiffs. It was held that this deduction, in the absence of the plaintiff's consent, was not permissible either by way of salvage or to indemnify the promoter for expenses necessarily incurred in the preservation of the properties.

Personal liability of promoters.

A company being non-existent until it is incorporated can not ratify what its promoters have purported to do on its behalf before that time. It may, of course, subsequently by a new contract assume a contract made by a promoter, but a resolution merely purporting to adopt or ratify what has been done is insufficient to bind the company: Lindley, 6th ed., p. 232, and see *Duquesne* v. *La Compagnie Generale des Boissons Canadiennes* (1907) Q. R. 31 S. C. 409. Even though parties subsequently carry out some of the terms of the contract in the supposition that it is binding on the company the rule that the company must expressly assume the contract still applies: *Coit* v. *Dowling* (1898-1901) 4 Terr. L. R. 464, following *Re Northumberland Avenue Hotel* (1886) 33 Ch. D. 16. Consequently, persons who contract obligations on behalf of a proposed company do so at their own peril, for if the company, after incorporation, chooses to repudiate the obligation, they will be personally liable: *Irwin* v. *Lessard* (1889) 17 R. L. 589; and though the form of the transaction be the giving of security for an advance to a projected company the promoter is primarily liable, for the company not being in existence cannot be the principal debtor: *Clergue* v. *Humphrey* (1901) 31 S. C. R. 966.

The liability proceeds upon the ordinary principles of the law of contract. As a general rule the same prin-

ciple applies to the right of the company to claim the benefit of the acts of promoters—unless both are bound neither is bound forms the general rule. But sometimes the express provisions of a statute may enable the company to assert rights over property acquired or to claim the benefit of contracts made prior to incorporation. Promoters may not be allowed to hold for their own benefit property acquired by them on behalf of the company which they were engaged in organizing: *Sea Coast R. R.* v. *Wood*, 65 N. J. Eq. 530. Also the terms of the Act may be such that upon incorporation the legal title to property theretofore acquired for the proposed corporation is *ipso facto* transferred to it. But even in such cases it is wise to evidence the transfer by a conveyance.

Where individuals intend to form a company but owing to non-compliance with the statute no company is created, but business is carried on and liabilities are incurred, they may find that they are in a sense partners and personally responsible to the creditors. See *Seiffert* v. *Irving* (1888) 15 O. R. 173. The distinction between the liability of such persons and that of ordinary partners is thus stated by Boyd, C., in *Sandusky Coal Co.* v. *Walker* (1896) 27 O. R. 677, at p. 681, "The whole body of proposed corporators are not necessarily liable as partners in the case of the prosecution of business prior to incorporation, for the whole concern is not a partnership in that sense; but it is a quasi-partnership in this sense, that all those who take a practical part in the prosecution of the business or who sanction or ratify the conduct of affairs become liable as partners. The extent or proportion of liability between themselves depends upon the number of shares held by each; on this footing the profit and losses would be proportioned among them. The practical difference as to evidence is that in the case of partners all would be liable without notice of the obligation incurred; in the other case some evidence must be given to show knowledge or notice and assent on the part of each person to be charged."

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A mere agreement to take stock in an intended company which proves abortive will not constitute the subscriber a partner in the undertaking: *Sylvester* v. *McQuaig* (1878) 28 U. C. C. P. 443. It has been held in the Province of Quebec that signing the petition for incorporation renders provisional directors liable jointly and severally for the fees of the solicitor employed by the promoter to procure the incorporation of the company and before the company has in fact been incorporated: *Anger* v. *Corneillier* (1891) R. J. Q. B. 293 *sed quære.* See also on the liability of corporators of a nominal corporation which has no legal status: *Gildersleeve* v. *Balfour* (1893) 15 P. R. 293.

There is no personal liability when the contract is a provisional one only, to take effect upon the incorporation of the company. As to the liability of persons who contract, not personally but as trustees for a company to be incorporated: see *T. W. Hand Fireworks Co.* v. *Baikie* (1913) 43 Que. S. C. 325.

Promoters are not partners nor agents for one another.

As a general rule promoters are not partners, although they may become liable as partners for the acts of their co-promoters ratified by them: *Sandusky Coal Co.* v. *Walker, supra.*

Nevertheless it may often happen that the arrangement between the promoters, and their sanctioning and taking the benefit of contracts made on their behalf by certain of their number, or by persons acting in their interests, will render them all liable upon such contracts. Some of their number may be given or allowed to take upon themselves an authority to bind the others.

And persons who are promoters may at the same time become so associated by agreement that they are actually partners, when they will be liable for each others' acts as such: *Howard* v. *Dingman* (1907) 10 O. W. R. 127. See also *Moore* v. *Ontario Ins. Association* (1888) 16 O. R. 269; *Nelles* v. *Ontario Ins. Ass.* (1889) 17 O. R. 129; *Hamilton & Co.* v. *Townsend* (1886) 13 A. R. 534. It must be a question of fact in

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every case. Promoters are not, as such, agents for each other; *Wilson* v. *Hotchkiss* (1901) 2 O. L. R. 261, affirmed *sub nom*: *T. Milburn* v. *Wilson* (1901) 31 S. C. R. 481. See also *Hung Man* v. *Ellis* (1895) 3 B. C. R. 486; but where promoters have been authorized to act as agents for their co-promoters, the latter will be liable for the acts of the former according to the ordinary principles of the law of agency: *Wilson* v. *Hotchkiss, supra.* The company itself is not responsible for acts of the agents of promoters before its incorporation in the absence of express adoption thereof: *Gourlie* v. *Chandler* (1906-7) 41 N. S. R. 341.

Enforcement of collateral agreement by the company.

A buyer of shares from a promoter may have an interest in compelling the promoter to carry out his obligations to the company. Where a promoter sold a portion of shares to the defendant and the latter maintained that he had stipulated that his vendor should apply the purchase price towards payment of certain liabilities of the company in relation to its assets and the promoter sued the purchaser for payment of the purchase price the Supreme Court of Alberta *en banc* stayed execution to enable the purchaser to enforce this term of the contract: *Lazier* v. *McCullough* (1912-3) 6 Alta. L. R. 503.

For a more extended and very clear discussion of the general law of Promoters in all its different aspects the reader is referred to Machen on Corporations, Vol. 1, sections 307 to 415.

Holding Stock of Other Companies.

Conditions on which company may purchase stock of other companies.

44. The company shall not under any circumstances use any of its funds in the purchase of stock in any other corporation, unless nor until the directors have been expressly authorized by a by-law passed by them for the purpose and sanctioned by a vote of not less than two-thirds in value of the capital stock represented at a general meeting of the company duly called for considering the subject of the by-law: Provided that if the letters patent authorize such purchase it shall not be necessary to pass such by-law. 2 E. VII., c. 15, s. 35.

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Common law rule.

At common law a corporation may not purchase or otherwise deal in the shares of other corporations without power so to do either express or to be implied from the nature of its business or objects. Brice, 3rd ed., p. 132. But the power will be readily implied. See *Royal Bank of India's Case* (1869) L. R. 4 Ch. 252; *Ex parte Contract Corporation* (1868) L. R. 3 Ch. 105; *Joint Stock Discount Co.* v. *Brown* (1869) L. R. 8 Eq. 381.

With regard to semi-public corporations it is well settled that they cannot, without express statutory authority, purchase, take or deal in the shares of other companies: *Great Eastern R. Co.* v. *Turner* (1872) L. R. 8 Ch. 149; *Great Western R. Co.* v. *Metropolitan R. Co.* (1863) 32 L. J. Ch. 382.

But apparently a company may accept shares owned by a person indebted to it as a compromise for a debt if not taken with the intention of retaining them as an investment: *Re Lands Allotment Co.* (1894) 1 Ch. 616. See *Canada Life Ins. Co.* v. *Peel Manufacturing Co.* (1874) 26 Gr. 487.

Effect of section.

It is submitted that the section does not confer any additional power on a company to purchase shares beyond the powers which may be implied by law or conferred by the Act.

The Act itself does not in express terms confer on companies incorporated under it the power to use their funds in the purchase of shares of other companies. Accordingly, the power is to be sought for in the express words of the letters patent or as ancillary to the powers thereby conferred and it is the usual practice to embody in the letters patent themselves the power to acquire shares of other companies.

An instructive case on the question of the power of a company to invest in the shares of other companies is *Re Atlas Loan Company, Elgin Loan Co.'s Claim* (1905) 9 O. L. R. 250.

The facts of this case were as follows:—The Elgin Loan Company had a large savings account with the Atlas Loan Company and in order to enable the Atlas Loan Company (which was authorized to invest in

shares which the Elgin Loan Company could not do) to purchase a number of shares of a coal company, it was arranged that the Elgin Loan Company should lend the Atlas Loan Company $55,000, the amount required to purchase such shares on the security of a debenture of the Atlas Loan Company for that amount. The Elgin Loan Company was to be permitted to call in the loan whenever it saw fit and was also to hold the shares purchased as collateral security and was to be paid five per cent. interest on the money advanced, or at its option take the dividends on the shares, and was to receive one-half the difference between the purchase price and the selling price when the shares were sold. Sect. 44.

It was held by Meredith, C.J., that the transaction was a *bona fide* one, not merely a device to enable the Elgin Loan Company to invest in shares and the Elgin Loan Company accordingly was held to be entitled on the winding up of the Atlas Loan Company to rank as a creditor.

Section 44 merely imposes a restriction on the exercise of the power in the case of companies which possess it, *i.e.*, they may not use their funds in the purchase of shares of other companies without complying with the requirement of the section. It would appear that if shares have been acquired without the use of the company's funds for that purpose, the holding of such shares would be legal: *Victoria Montreal Fire Insurance Co.* v. *Strome* (1905) 15 Man. L. R. 645 (per Dubuc, C.J.) a case decided on the corresponding provisions of the Manitoba Companies Act, R. S. M. (1902) c. 30, s. 68. Perdue, J., however, thought that it was incumbent on the plaintiffs to show that the provisions of the Companies Act had been complied with when seeking to make the company liable for calls upon shares alleged to have been purchased or subscribed for by it. Restriction.

On the main question this case is not altogether satisfactory, Dubuc, C.J., holding that the objection that there was no evidence that a by-law was passed not having been raised at the trial could not be given

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effect to on the appeal. Perdue, J., dissenting, held the opposite; the Court being divided the appeal was dismissed.

See also *Foley* v. *Barber* (1909-10) 1 O. W. N. 40.

If a company has not power to purchase shares in another company it will be liable to repay money obtained through a representation by its agent that it has such power: *Whaley* v. *O'Grady* (1912) 4 D. L. R. 485.

No by-law is necessary if provisions are inserted in the letters patent authorizing the purchase; and it is the usual practice to ask for such a clause in this application for incorporation.

Capital Stock.

Stock to be personal estate.

45. The stock of the company shall be personal estate, and shall be transferable, in such manner and subject to all such conditions and restrictions as are prescribed by this Part or by the letters patent or by the by-laws of the company. 2 E. VII., c. 15, s. 36.

See the notes to s. 64.

Allotment of stock.

46. In so far as the stock of the company or any increased amount thereof is not allotted by the letters patent or the supplementary letters patent and when no other definite provision is made by such letters patent or supplementary letters patent such stock shall be allotted at such times and in such manner as the directors by by-law shall prescribe. 2 E. VII., c. 15, s. 37.

General note on shares and their nature.
Acquisition of shares.
- **How one may become a shareholder.**
- **Subscription for shares before incorporation.**
- **Repudiation of subscription by subscribers to memorandum.**
- **Contract to take shares.**
- **Application.**
  - **(a) Verbal application.**
  - **(b) Application in writing.**
  - **(c) Application under seal.**
- **Allotment.**
- **Mode of allotment.**
- **Notice of allotment and withdrawal of application.**

Repudiation of subscription after allotment. Sect. 46.

Defences:—

(1) Fraud or misrepresentation.
(2) Conditional subscription.
(3) Company other than the one in which shares were applied for.
(4) No shares created which can properly be allotted.
(5) Total failure of consideration.
(6) Infancy.

General note on shares and their nature.

A share is an aliquot separate integral part of the authorized capital of a joint stock company. The capital may be divided into shares of one, two or more classes, known as ordinary and preferred. See also s. 7B as to shares without par value.

In the absence of any special provision qualifying the rights incident to particular shares, each share is in point of law of the same character and possessed of the same attributes, and therefore entitles its holder in all respects to the same rights as are possessed by the holders of other shares. See *Oakbank Oil Co.* v. *Crum* (1883) 8 App. Cas. 65; *Birch* v. *Cropper* (1889) 14 App. Cas. 525.

For example: A. is the holder of 100 shares of stock, each of the par value of $100, on which he has paid $10 per share, making his holding of stock $10,000, while his net cash investment is $1,000. B. is a holder in the same company of 10 shares of the par value of $100 each, fully paid up, making his holding of stock $1,000, while his total cash investment is also $1,000. In the absence of any special provisions in the by-laws dealing with such set of circumstances, if the company declares a dividend of 5 per cent., A. will receive a dividend of $500 and B. will receive a dividend of $50, though their cash investment is the same.

Shares are not goods, wares or merchandise, within the seventeenth section of the English Statute of Frauds: *Watson* v. *Spratley* (1854) 10 Exch. 222; *Colt* v. *Nellerville* (1725) 2 P. Wms. 304. But see *Evans* v. *Davies* (1893) 2 Ch. 216.

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They are rather in the nature of choses in action, per Sir Charles Fitzpatrick, C.J., in *Roche* v. *Johnson* (1916) 53 S. C. R. 18, at p. 23. Nor were they goods and chattels within the meaning of the Ontario Execution Act, R. S. O. (1887) c. 64, s. 16, but the statute has since been amended to expressly include them, and see now R. S. O. (1914) c. 80, ss. 12 ff.

It is usually provided by the Execution Acts of the various Provinces of Canada that shares may be taken in execution under a writ *Fi. Fa.* goods, and the method of so doing is there prescribed.

Acquisition of shares.

Section 46 forms a very fragmentary portion of the law relating to the acquisition of shares, the subject dividing itself into

(1) Application.
(2) Allotment.
(3) Acceptance by notice of allotment.

Section 23 of the Imperial Act, 1862, 25 and 26 Vict. c. 89, provides that not only subscribers to the memorandum of association but every other person who has agreed to become a member of the company, and whose name is entered on the register of members, shall be deemed to be a member of the company, but no similar provision is contained in The Dominion Act; consequently it is necessary, in so far as the English decisions on shareholders turn upon the particular wording of s. 23, to apply them with great caution to cases arising in our courts.

How one may become a shareholder.

A binding contract to take shares is entered into by an offer in that behalf being made, such offer being accepted, and such acceptance being communicated to the applicant or his agent. Acceptance includes both allotment and notice of allotment, neither of these two without the other constituting an acceptance.

Under the Dominion Act a person may become a shareholder in any one of the following ways:—

(1) By subscribing to the memorandum of agreement prior to incorporation of the company.

(2) After incorporation by agreeing with the company to take shares.

(3) By taking a transfer of shares.

(4) By becoming the personal representative of a deceased shareholder.

(5) Possibly, by allowing his name to be on the register of shareholders or otherwise holding himself out or allowing himself to be held out as a shareholder.

In considering how one may become a shareholder and the rights and obligations of shareholders, regard must be had not only to s. 46, but also to the interpretation of the term shareholder, which is defined in s. 3(d) as "every subscriber to or holder of stock in the company and includes the personal representatives of the shareholder."

A man may be none the less a shareholder because he has not paid for shares pending the ascertaining of their value: *Re Gramm Motor, &c., Co. and Bennett* (1915-6) 35 O. L. R. 224; and see this case further for the distinction between an intending shareholder and a shareholder *in praesenti*.

Subscription for shares before incorporation of company.

Every one who, before the issue of the charter, subscribes to the memorandum of agreement, becomes forthwith, upon the incorporation of the company, by virtue of s. 5 of the Act, a shareholder *ipso facto* holding the number of shares for which he has subscribed. This is the case even though he has not signed the petition for incorporation and though his name does not appear in the charter: *Modern Bedstead* v. *Tobin* (1908) 12 O. W. R. 22.

The letters patent in the case of a Dominion company create and constitute the petitioners "and any others who have become subscribers to the memorandum of agreement," a body corporate: *Boultbee's Case* (1889) 16 A. R. 508; *Tilsonburg* v. *Goderich* (1885) 8 O. R. 565.

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The memorandum of agreement, the signature of which makes the subscriber a shareholder on incorporation, is the memorandum which accompanies the petition and is made with the company to be formed as well as by each subscriber with the other. So where the memorandum signed was not the one which accompanied the petition the signatory did not become a shareholder by virtue of the statute: *Re Nipissing Planing Mills, Rankin's Case* (1909) 18 O. L. R. 80; *Canadian Druggists* v. *Thompson* (1910) 2 O. W. N. 1213, 24 O. L. R. 401; see also *Re Port Arthur Wagon Co., Smyth's Case* (1916) 9 O. W. N. 383 (1917) 12 O. W. N. 59; (1919) 57 S. C. R. 388; *Re Dominion Milling Co., Dennis's Case* (1915) 8 O. W. N. 496; *Vilandre* v. *Allie* (1915) 22 D. L. R. 577; *Magog Textile and Paint Co.* v. *Price* (1887) 14 S. C. R. 664; *Steevens* v. *London Steel Works Co., Delano's Case* (1888) 15 O. R. 75.

English decisions.

The following are some of the leading cases under the Imperial Companies Act of 1862 or similar legislation:—

The original subscribers to the memorandum of agreement are by the Act deemed to have taken the shares set opposite their names: *Evans's Case* (1867) L. R. 2 Ch. 427; *Migotti's Case* (1867) L. R. 4 Eq. 238.

In the case of such subscribers no allotment is necessary: *Re London and Provincial Co.* (1877) 5 Ch. D. 525, and they are bound to take the shares from the company and pay for them: *Mackley's Case* (1875) 1 Ch. D. 247: *Alberta Improvement Co.* v. *Peverett* (1914) 7 D. L. R. 314; (1914-5) 7 W. W. R. 757.

Repudiation of subscription by subscriber to memorandum.

As has been stated above upon the issue of the letters patent the subscriber becomes a shareholder and no further act by the company, such as allotment, is necessary: *In re London Speaker* (1889) 16 A. R. 508; *Patterson* v. *Turner* (1902) 3 O. L. R. 373, 377; *Bergeron* v. *Jonquière* (1913) 22 Que. K. B. 341; *In re Haggart, Peaker & Runion's Case* (1891-2) 19 A. R. 582.

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The signing of the memorandum of agreement under seal is an irrevocable act and the doctrine of *Nelson Coke and Gas Company* v. *Pellatt* (1904) 4 O. L. R. 481, applies, per Boyd, C., in *Modern Bedstead* v. *Tobin* (1908) 12 O. W. R. 22. It has been held that an incorporator is not entitled to repudiate on the ground of fraud: *Bergeron* v. *Jonquière, supra*; *Buff Pressed Brick Co.* v. *Ford* (1915) 8 O. W. N. 63. See also *In re Metal Constituents, Limited* (1902) 1 Ch. 707, and it is submitted the same rule applies to one who is not a petitioner but who has signed the memorandum of agreement. In *Patterson* v. *Turner* (1902) 3 O. L. R. 373, it was not proved that the memorandum of agreement signed by the defendant was the one accompanying the petition, otherwise the action against the subscriber might have been successful, per Britton, J., at p. 377, although the terms of the prospectus had not been complied with. It was stated in *Modern Bedstead* v. *Tobin, supra,* per Boyd, C., at p. 25, that the subscriber can not repudiate unless he can show such a state of facts as would justify a rescission of the contract by the Court, and in *Bergeron* v. *Jonquière* (1913) 22 Que. K. B. 341, it is suggested at p. 353 that the shareholder might have a right of action to dissolve the relation between himself and the company.

Contract to take shares.

The better opinion appears to be that there is no difference between a contract to take shares and any other contract; a formal agreement is not necessary. If in substance an agreement is made the form is not material, and the question whether a person has agreed to become a shareholder will turn upon the facts of each particular case. See *Re Bolt and Iron Co., Hovenden's Case* (1884) 10 P. R. 434; *Halifax Carette Co.* v. *Moir* (1895) 28 N. S. R. 45. See also *Halifax, &c., Co.* v. *McManus* (1894) 27 N. S. R. 173; *In re Moore Bros. Co.* (1899) 1 Ch. 627. The contract need not be sanctioned by by-law: *Re Bishop Engraving and Printing Co., Ex parte Howard* (1887) 4 Man. R. 429.

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The usual method by which such an agreement is constituted is an application for shares by the intending shareholder and allotment by the directors of the company to him of the shares applied for.

Application.

An application to be binding must be made to the company, and no contractual relation between the applicant and the company is established where, *e.g.*, the application is addressed to a syndicate holding the shares of the company: *Consumers' Cordage Co., Ltd.* v. *Molson* (1912) 2 D. L. R. 451. But where the application read "We, the undersigned, severally subscribe for and agree to purchase from Edward Slade & Co." the shares in question; in the absence of evidence that Slade had agreed to take up the issue of shares himself and sell them on his own behalf, it was held that the application was really made to the company who could enforce it: *Forget* v. *Cement Products Co.* (1916) 28 D. L. R. 717. If it had been an offer to buy shares from Slade his transferring it to the company could not enable the latter to sue, *ibid.* at p. 722.

The application may be made either in person or by an agent duly authorized, and where made through an agent the ordinary principles of the law of agency apply: *Davidson* v. *Grange*, 4 Gr. 377; *Chisholm's Case* (1885) 7 O. R. 448. See also *Coté* v. *Stadacona Insurance Co.* (1881) 6 S. C. R. 193; *Ramsgate Hotel Co.* v. *Montefiore* (1886) L. R. 1 Ex. 109; *Pentelow's Case* (1869) L. R. 4 Ch. 178; *Ingersoll and Thamesford Gravel Road Co.* v. *McCarthy* (1858) 16 U. C. R. 162; *Ottawa Dairy Company* v. *Sorley* (1906) 34 S. C. R. 508.

A company employed local agents to obtain subscriptions for stock on terms of a commission on shares subscribed. At the solicitation of one of these agents C., intending to subscribe for five paid up shares, paid $500 and signed the subscription book, the columns for the amount of the subscription and the number of shares being at the time left in blank. The columns were afterwards, in C.'s presence but without

his consent, filled in by the agent of the company by inserting the words fifty shares. Having discovered his position, C. endeavored, but ineffectually, to induce the company to relieve him of the larger liability. The company afterwards declared a dividend of ten per cent. on the paid-up capital and the plaintiff received a cheque for $50.00 for which he gave a receipt. In an action for calls on the fifty shares, held, reversing the judgment of the Court below, that the evidence showed that C. never entered into a contract to take fifty shares, that the receipt given for a dividend of ten per cent. on the amount actually paid was not an admission of his liability for the larger amount, and that he therefore was not estopped from showing that he was never in fact holder of the fifty shares: *Coté* v. *Stadacona Insurance Co.* (1881) 6 S. C. R. 193. Sect. 46.

A subscription for shares by a person in his own name but really as a trustee, is valid: *Davidson* v. *Grange* (1854) 4 Gr. 377.

The application for shares may be (a) verbal; (b) in writing; (c) in writing under seal.

(a) Verbal application.

Owing to the fact that s. 3 (d) of the Act defines the term " shareholder " as " every subscriber to stock in the company " it has been argued that every application for shares must be in writing subscribed by the applicant. See the definition of subscriber by Osler, J.A., in *Re London Speaker Printing Co.* (1889) 16 A. R. 508, at p. 516, as " a person who has put down his name to a contract, by which he binds himself to contribute to the extent of the number of shares for which he puts down his name." See also on the point the argument for the appellants in *Re Queen City Refining Co.* (1885) 10 O. R. 264. However, it has been held that a person may become a shareholder without signing any written agreement to take shares: *Caston's Case* (1885) 12 A. R. 486; *Union Fire Insurance Co.* v. *O'Gara* (1883) 4 O. R. 359; in *National* v. *Egleson* (1881) 29 Gr. 406 a holder of stock was held estopped from setting up that he had not subscribed.

(b) Application in writing.

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It is important that the subscription should authorize the allotment of a smaller number of shares than the number applied for, for otherwise the allotment of a lesser number will entitle the applicant to repudiate: *Ex parte Roberts* (1852) 1 Drew 204; *Re Barber* (1852) 15 Jur. 51. As to what amounts to an application for shares see *Re Dominion Milling Co., Dennis's Case* (1915) 8 O. W. N. 496.

Where preference shares are subscribed for on terms that the subscriber shall receive in addition a certain number of common shares, the company before taking action for the enforcement of the subscription need not do more than declare itself ready to deliver the common shares on payment; it is not necessary that the company should actually offer the bonus shares to the subscriber and deposit them in Court: *Forget* v. *Cement Products Co.* (1915) 24 Que. K. B. 445, affirmed in Privy Council (1916) 28 D. L. R. 717.

(c) Application under seal.

The doctrine of *Nelson Coke and Gas Co.* v. *Pellatt* (1904) 4 O. L. R. 481, in which it was held that an application under seal can not be withdrawn, makes the distinction between ordinary applications in writing and those under seal important. The matter is discussed below under "withdrawal of application." It is accordingly important to consider what constitutes an application under seal and the better opinion would appear to be that the instrument must have been intended by the parties to be under seal and actually have a seal affixed, and the mere printing of a form of seal on the paper opposite the signature without reference to the seal is insufficient: *Farmers Bank* v. *Sunstrum* (1909) 14 O. W. R. 288; *Connor Ruddy Co.* v. *Robinson Whyte Co.* (1909) 19 O. L. R. 133.

As to what will and what will not constitute a document under seal see *Regina* v. *St. Paul Garden,* 14 L. J. M. C. 109. In *Re Sandlands,* L. R. 6 C. P. 411; *Marchant* v. *Morton* (1901) 2 K. B. 832; *Nagle* v. *Kilts,*

Tay. R. 269; *Clement* v. *Donaldson* (1853) 9 U. C. R. 299; *Whittier* v. *MacLennan* (1856) 13 U. C. R. 638; *Hamilton* v. *Dennis* (1866) 12 Gr. 325; *Bell* v. *Black* (1882) 1 O. R. 125; *Thompson* v. *Skill* (1908) 12 O. W. R. 1033, and (1909) 13 O. W. R. 887. Sect. 46.

Allotment.

The general principle to be applied is that there must be, first, a subscription or proposal by the subscriber; secondly, an allotment or acceptance by the company, and thirdly, notice of such allotment to the subscriber.

An unaccepted subscription cannot be enforced: *Duclos* v. *Bilodeau* (1914) 47 Que. S. C. 205; and every subscription for shares must be accepted, if at all, as it is given: *Halifax Carette Co.* v. *Moir* (1895-6) 28 N. S. R. 45. See also on acceptance of application: *Re Port Arthur Wagon Co., Price's Case* (1915-6) 9 O. W. N. 358; *Re Federal Mortgage Corporation and Kipp* (1916-7) 24 B. C. R. 12; *Re Bishop Construction Co., Ltd.* (1914) 15 D. L. R. 911.

Meaning of term "allotment."

The meaning of the term "allotment" is discussed in *Nicol's Case* (1884) 29 Ch. D. 421, where Chitty, J., at p. 426, said: "There is no difference as has often been pointed out between a contract to take shares and any other contract. What is termed 'allotment' is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in the offer or a less number to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance. To my mind there is no magic whatever in the term 'allotment' as used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares. It does not, how-

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ever, make the person who has thus agreed to take the shares a member from that moment; all it does is simply this—it constitutes a binding contract under which the company is bound to make a complete allotment of the specified number of shares and under which the person who has made the offer, and is now bound by the acceptance, is bound to take that particular number of shares. In most cases the act of placing the person who has agreed to become a member on the register is a mere matter of form, and may be described as a mere ministerial act; but it appears to me that in point of law all that is done by the process I have just indicated and all that was done in this case, was to make a complete and binding contract."

Allotment necessary.

Allotment is a necessary element in the contract to take shares: *Re Zoological Society of Ontario, Cox's Case* (1889) 16 A. R. 543; *Re Bolt & Iron Co., Hovenden's Case* (1884) 10 P. R. 434; see also *Re Dominion Milling Co., Dennis's Case* (1915) 8 O. W. N. 496; *Re Canadian Tin Plate Co., Morton's Case* (1906) 12 O. L. R. 594; *Robertsonville* v. *Bilodeau*, 46 Que. S.C. 5. The contrary view was maintained in *Roscony* v. *Desmarais* (1886) 2 M. L. R. S. C. 381, and *Rogers* v. *Hersey* (1864) 15 L. C. R. 141, but these cases are not likely to be followed elsewhere than in the Province of Quebec.

The above rule is subject to the qualification that conduct may take the place of formal subscription and allotment: *In re Gramm Motor Truck, &c., Co.* (1915-6) 35 O. L. R. 224, 231, as, *e.g.*, where a person allows his name to remain on the register and acts as the owner of shares. See also *Morrisburgh and Ottawa* v. *O'Connor* (1915) 34 O. L. R. 161; *Re British Cattle Supply Co., McHugh's Case* (1919) 16 O. W. N. 62, 206.

And in *Alberta Rolling Mills* v. *Christie* (1919) 58 S. C. R. 208, Anglin, J., at pp. 217, 218, said: "Allotment is no doubt essential in the ordinary case. But the entry of it in the directors' minutes is merely evidentiary. The absence of such entry and of a formal notice of allotment are not conclusive against membership. The evidence which they would afford may be

supplied, as I think it was in this case, by the issue and delivery of share certificates and the sending of the notices of meetings followed by the giving of proxies." Sect. 46.

As to the necessity for allotment to make a shareholder in a company re-incorporated as a Dominion company by special Act a shareholder in the new company even when he has received dividends from the new company, see *Re Dominion Trust Co. and Allen* (1917) 37 D. L. R. 251.

Mode of allotment.

In cases concerning allotment arising under the Act, due regard must be had to section 46, which states that in default of other provision in the letters patent stock is to be allotted "at such times and in such manner as the directors by *by-law* shall prescribe." Accordingly, cases decided under Acts which state that shares shall be allotted when and as the directors by by-law or *otherwise* ordain should be applied with caution. See *Hill's Case* (1905) 10 O. L. R. 501, and *Robert* v. *Eastern Townships Bank* (1908) Que. 17 K. B. 157, at p. 159. In the former case a subscriber was debited in the company's stock ledger with the shares applied for, was placed on the list of shareholders and having been drawn on for the first payment of ten per cent. paid the draft. It was held that these facts constituted a mode of allotment "ordained" by the directors within the meaning of the existing Ontario Companies Act (1897) R. S. O. c. 191, s. 26.

Under the Dominion Act the proper method of procedure is to pass a general by-law providing that shares may be allotted by resolution of the directors; or to make each allotment by by-law. But in *Re Port Arthur Wagon Co., Price's Case* (1915) 8 O. W. N. 480, (1915-6) 9 O. W. N. 358, the allotment was by resolution and the contributory was held to be bound. See also *Port Arthur Wagon Co., Smyth's Case* (1915-6) 9 O. W. N. 383, 384, affirmed (1917) 12 O. W. N. 59, but reversed on other grounds (1919) 57 S. C. R. 388.

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Proof of allotment.

A specific allotment is proved by production of the minute-book of the board of directors containing the minutes of the meeting at which the allotment was made and by proving the posting of the letter containing the notice of allotment: *North-West Battery* v. *Hargraves* (1913) 23 Man. L. R. 923; 15 D. L. R. 193. For the latter purpose it is usual and desirable that the company's mailing clerk should make a declaration of posting in the usual form.

Allotment can also be shown by inference and implication as well as by express words, *e.g.*, subsequent payments made by the subscriber and accepted by the company, it has been held, will support an inference that an application has been accepted and shares allotted: *Pierson* v. *Crystal Ice Co.* (1917) 2 W. W. R. 1175, 1253, affirming (1916) 29 D. L. R. 569.

So also the issue and delivery of share certificates and the sending of notices of meetings followed by the giving of proxies may supply the evidence, which entry of allotment in the minute book and the giving of formal notice would afford: *Alberta Rolling Mills* v. *Christie* (1919) 58 S. C. R. 208, 217, 218.

The by-law passed by the directors may, of course, prescribe some manner of allotment which puts the disposal of stock out of the power of the directors, *e.g.*, the by-law may provide that the shareholders shall allot the stock, and if such by-law has been confirmed by the shareholders the directors thereafter have no power to pass a by-law directing its repeal and providing for allotment of shares by themselves. See *Stephenson* v. *Vokes* (1896) 27 O. R. 691.

Formal requisites.

As regards formal requisites, if the subscriber expressly waives statutory formalities in connection with allotment he may be bound by an irregular and informal allotment: *Fort William Commercial Chambers* v. *Braden* (1913) 6 O. W. N. 24; (1914-5) 7 O. W. N. 679; and see *Smart* v. *Bowmanville Machine, &c., Co.*, 25 U. C. 503, at p. 510. Likewise a shareholder may be estopped by his conduct from setting up the irregularity of an allotment: *Union Bank* v. *Gourlay* (1916) 31 D. L. R. 565; (1917) 37 D. L. R. 599.

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It is not necessary to identify with denoting numbers the particular shares allotted, although it is sound practice to do so: *National* v. *Egleson* (1881) 29 Gr. 406. Under Acts based on the Imperial Act, *e.g.*, the Alberta Act s. 26, such numbering is compulsory.

A resolution allotting "all shares of stock subscribed for and transferred to date" is too vague: *McCurdy* v. *Oak Tire, &c., Co.* (1919) 44 O. L. R. 571, 574.

The duty of allotting shares is a matter for the board, and if the board of directors is incomplete, or if a board greater in number than that authorized by the charter attempts to act an allotment by them is ineffectual: *Re Nutter Brewery Co.* (1909) 1 O. W. N. 400; *Twin City Oil* v. *Christie* (1909) 18 O. L. R. 324; *Re Carpenter, Ltd., Hamilton's Case* (1915-16) 35 O. L. R. 626. As to allotment by a *de facto* board see *Traders Trusts* v. *Goodman* (1917) 37 D. L. R. 31. Nor can the power be delegated by the board to one of their number or to an officer of the company: *Re Bolt and Iron Co.* (1884) 10 P. R. 434; *Pakenham Pork Packing Co., Galloway's Case* (1906) 12 O. L. R. 100; *Twin City Oil* v. *Christie* (1909) 18 O. L. R. 324; *Higginbotham's Case* (1906) 12 O. L. R. 112; see also *Fischer* v. *Burland Carriage Co.* (1906) 8 O. W. R. 579, where under the special circumstances of the case the subscriber was held to be bound. The Act contains no provisions as to the appointment of an executive committee of the directors and the power accordingly is one which must be exercised by the directors as a board.

If there has been no allotment in fact the sending out of notices of calls will not operate to bind the subscriber: *Re Canadian Tin Plate, Morton's Case* (1906) 12 O. L. R. 594.

Ineffective allotment.

An allotment may be ineffective because *ultra vires* of the directors. The following are examples:—Where directors on an increase of capital allotted shares to themselves at par so as to alter the control of the company the allotment was declared invalid: *Martin* v. *Gibson* (1908) 15 O. L. R. 623. The same result followed where directors made a one-sided allotment of the

Ultra vires.

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While it cannot be said that in all cases the directors are bound to offer to existing shareholders *pro rata* any treasury shares proposed to be issued it is the proper and safe course where the shares are worth more than par.

An allotment which is part of a colorable transaction to enable a company to issue shares at a discount is *ultra vires: Lindsay* v. *Imperial Steel and Wire Co.* (1910) 21 O. L. R. 375. If the statutory conditions precedent to the valid creation of the stock, *e.g.*, preference shares, have not been complied with, then, there being no shares of the kind specified to allot, an allotment will be a nullity: *Manes Tailoring Co.* v. *Willson* (1907) 14 O.L.R. 89, and see *Pakenham Pork Packing Co., Galloway's Case* (1906) 12 O. L. R. 100. There is no authority in the Act to enable a company to issue half shares, and in a case decided under the Ontario Act it was held that the holder of a half share was not liable thereon in a winding-up: *McGill Chair Co., Munro's Case* (1912) 26 O. L. R. 254.

Shares issued at a discount.

It is illegal to issue shares at a discount; and although an agreement to allot shares at a discount accepted by the subscriber does not create an enforceable contract before the shares are issued, after the shares have been issued to the shareholder he may be guilty of such acts of acquiescence as to disentitle himself to be relieved in a winding-up: *Re McGill Chair Co., Munro's Case* (1912) 26 O. L. R. 254. In this case the acts of the subscriber, which it was held showed that he had acted as a shareholder, were giving a proxy in which he was described as holder of the shares in respect of which he was sought to be made liable, attending two meetings of shareholders and voting at a shareholders' meeting at which it was resolved that all

bonus stock (which included his shares) should be "recalled into the company." See also *In re James Pilkington & Co.* (1916) 85 L. J. Ch. 318; *Bank of Ottawa* v. *Jones* (1919) 46 D. L. R. 407, and cases cited; and, on subscription at a price below par: *Burden* v. *Stanford* (1915) 21 D. L. R. 209; 48 N. S. R. 532. Sect. 46.

On the other hand a company is not bound to issue its shares at a price above par because they are quoted at a premium: *Harris* v. *Sumner* (1908) 5 E. L. R. 161; *Hilder* v. *Dexter* (1902) A. C. 474, at p. 480; and it is not illegal for the company to give to a subscriber in consideration of his taking shares an option to take up at a future date further shares at par: *Hilder* v. *Dexter, supra.* At less than market value.

A company can not in answer to an application for shares, instead of allotting treasury stock to the subscriber, cause to have transferred to him shares already issued to another person: *Fitzherbert* v. *Dominion Bed Mfg. Co.* (1915) 23 D. L. R. 125, 126; and see *International Casualty Co.* v. *Thompson* (1913) 48 S. C. R. 167; 11 D. L. R. 634. And where the applicants repudiate such shares promptly on learning that they have not been allotted the shares applied for, they will not be liable as contributories: *Western Union Fire Insurance Co.* v. *Alexander Loggin and Holmes* (1918) 39 D. L. R. 632. Transfer of issued shares.

If, however, it is shown that the company had shares available for allotment, a tender to the subscriber of shares which had been issued to the president of the company and purported to have been surrendered will not of itself invalidate the allotment: *Graham Island Collieries* v. *McLeod* (1914) 16 D. L. R. 281.

If a company does not issue a prospectus on or with reference to its formation shares may not be allotted until a statement in lieu of a prospectus has been filed in compliance with s. 43C (1). There is no requirement in the Dominion Act corresponding to s. 112 of the Ontario Act forbidding the allotment of any shares Statement in lieu of prospectus.

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Payment of deposit.

offered to the public for subscription unless the amount payable on application has been paid. Where such a provision exists the directors when proceeding to allotment should examine the company's pass book to see whether the cheques for payment of the deposit have been honored: *Brewery Assets Co., Trueman's Case* (1894) 3 Ch. 272.

Allotment against promissory note.

Any shareholder is entitled to bring an action for cancellation of shares in respect of which a certificate for fully paid shares has been issued against a promissory note, but the cause of action is at an end when the note is paid: *O'Sullivan* v. *Donovan* (1906) 8 O. W. R. 320, reversing (1906) 7 O. W. R. 78. However, in other cases it has been held or assumed that shares might be allotted on receipt of a promissory note: *Anglo-American Lumber Co.* v. *McLellan* (1908) 13 B. C. R. 318, (1908) 14 B. C. R. 93; *Standard Bank* v. *Stephens* (1908) 16 O. L. R. 115, where the cases are collected at p. 121; *Canada Furniture Co.* v. *Banning* (1918) 39 D. L. R. 313; *Adair* v. *British Crown Co.* (1915) 24 D. L. R. 905. Where a subscriber has given a promissory note and has received and kept the share certificate he can not evade liability on the note on the ground that it was obtained on a representation which was not fulfilled. His remedy in such case is an action or counterclaim for damages for breach of warranty: *Graver Tank Works* v. *Morris* (1916) 28 D. L. R. 696. (Man. C. A.).

Allotment dispensed with.

Allotment may under certain circumstances be unnecessary and a valid contract for the issue of shares may be entered into by a proposal on the part of the company to issue shares or sell treasury stock through a duly authorized agent, and acceptance of this proposal by the purchaser of the shares: see *Metropolitan Fire Insurance Co., Wallace's Case* (1900) 2 Ch. 671, where Cozens Hardy, J., considers the distinction between an application for shares and the acceptance of a prior offer from the company. Section 46, however, would seem to preclude the possibility of

such action and to require that every share to be validly issued must be allotted by the board of directors. But it has been held under the Ontario Companies Act that under certain circumstances formal allotment may be unnecessary: *Re Gramm Motor Truck* (1915) 35 O. L. R. 224, and see *Boulet* v. *Houdon* (1917) 51 Que. S. C. 29, *Re Winding-up Act and Canadian Tractor, &c., Co.* (1914-5) 7 W. W. R. 562; *Pineau* v. *St. Laurent* (1916) 25 Que. K. B. 210.

In *Acadia Loan Corporation* v. *Wentworth* (1884-1907) 40 N. S. R. 525 where an application was made from the agent of the company to the defendant to take shares and the defendant agreed with the company to take a definite number of shares and pay calls thereon, it was held that the transaction was complete and the defendant became a shareholder, although no shares were formally allotted to him and he received no notice of allotment. The company in question was incorporated by private Act of the Dominion Parliament (1900) c. 86.

The above case followed *European and North American Ry. Co.* v. *McLeod* (1875-76) 16 N. B. R. 3. There the authorized agent of the company applied to an individual and requested him to take shares in the company, and he assented and signed a stock list for a definite number of shares. It was held that the offer coming from the company and being accepted by the defendant, a complete contract was formed and nothing more was needed to complete the transaction.

In *Anglo-American Lumber Co.* v. *McLellan* (1908) 13 B. C. R. 318; (1908) 14 B. C. R. 93, the defendant purchased a definite number of shares in the company and gave his note therefor, signing at the same time an application for the shares. The president of the company placed the shares and note in a bank, the shares to be delivered up on payment of the note. There was no formal allotment beyond a resolution empowering the president to dispose of the shares. Clement and Irving, JJ., in holding that the defendant became owner of the shares on the signature of the application

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and the delivery of the note, appeared to treat the transaction as a present purchase of the stock.

The Court of Appeal in the province of Manitoba held that an agreement to take shares although accompanied by a promissory note in part payment is nothing more than an application and is not binding without acceptance by the company and notification thereof to the applicant: *Kruger* v. *Harwood* (1907) 16 Man. L. R. 433. In that case Mathers, J., whose judgment was affirmed on appeal, said at p. 434, "although the stock book signed by him (the subscriber) has a heading in the form of an agreement to take stock subscribed for, I think it amounts to nothing more than an application for stock, which the company had a right to accept or reject, and that it did not become an agreement until accepted by the company, and notice to the defendant of such acceptance."

Where there has been no formal acceptance of the application and no allotment the parties are bound only by completed acts, *e.g.* payment of shares and receipt of certificates: *Re Dominion Milling Co., Dennis's Case* (1915) 8 O. W. N. 496. See also *Re Nagrella Co., Ltd.* (1915) 8 O. W. N. 452, where there were great irregularities, and *Liquidator of the Monarch Oil Co.* v. *Chapin* (1917) 37 D. L. R. 772.

In *Western Canada Fire Ins. Co.* (*Craig's Case*) (1914) 19 D. L. R. 170, it was held that the receipt of share certificates following allotment and their retention without repudiating their ownership may establish a *prima facie* case of liability as a contributory; and, of course, if a person does acts which amount to an admission that he is a shareholder, that is sufficient to make him liable as such, though there may be no evidence of application or allotment, *e.g.*, where he transfers some of the shares in question and acts as a director: *Re Wiarton Beet Root Sugar Co., Alexander McNeill's Case* (1905) 10 O. L. R. 219. See also *Re Port Arthur Wagon Co., Smyth's Case* (1919) 57 S. C. R. 388.

Notice of allotment and withdrawal of application.

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Necessity for notice.

An offer to take shares, like any other offer, is not binding until it is accepted and acceptance takes place by allotment pursuant to the application. It is furthermore necessary that there should be a communication of the allotment to the applicant to complete the contract: *Re Canadian Mail Orders Limited* (1910) 2 O. W. N. 882. The necessity of communicating the allotment to the applicant is laid down in *Pellatt's Case* (1867) L. R. 2 Ch. 527, where Lord Cairns says:— "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract."

Notice of allotment within a reasonable time is necessary to bind the shareholder. The decision turned largely on the words of the application: *Nasmith* v. *Manning* (1880) 5 S. C. R. 417.

In *Vilandre* v. *Allie* (1915) 22 D. L. R. 577, it was held that an application could not be accepted by the company two years after it was made so as to bind the applicant, where the latter had paid nothing on his subscription and the company in the meantime had become insolvent.

Although allotment has not been communicated to the subscriber, he may be liable to a third party who is a holder in due course of a note given by the subscriber to the company in payment for the shares: *Standard Bank* v. *Stephens* (1908) 16 O. L. R. 115.

How given.

Notice of allotment may be given orally or in writing or by conduct: *Northwest Battery* v. *Hargrave* (1913) 15 D. L. R. 193, 205; *Gunn's Case* (1867-8) 3 Ch. App. 40, 45; and it has been held that taking the subscriber's money on account of his shares is conduct from which acceptance must be inferred: *Northwest Battery* v. *Hargrave, supra; Re Winding-Up Act and Canadian Tractor, &c., Co., Svaigher's Case* (1914-5) 7 W. W. R. 562.

Formal notice of allotment is not necessary to make the subscriber liable if it appears that he knew that

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the company accepted his application: *Re Publishers' Syndicate, Hart's Case* (1902) 1 O. W. R. 508; *In re Universal Banking Corporation, Gunn's Case* (1867-8) 3 Ch. App. 40; *Traders Trust Co.* v. *Goodman* (1917) 37 D. L. R. 31; *Re Winding-Up Act and Canadian Tractor, &c., Co.* (1914-5) 7 W. W. R. 562. *Re Monarch Bank, Murphy's Case* (1918-9) 45 O. L. R. 412, affirmed by Supreme Court of Canada, sub nom. *Murphy* v. *Clarkson* (1920) 17 O. W. N. 295. And where a subscriber received requests for payment of his shares although no notice of allotment had been given he was held liable, the evidence being held sufficient to prove that he had knowledge of the acceptance of his offer to buy shares: *Denison* v. *Lesslie* (1878-9) 3 A. R. 536; see especially the remarks of Moss, C. J. O., at p. 547. See also *Forget* v. *Cement Products Co.* (1915) 24 Que. K. B. 445; (1916) 28 D. L. R. 717; *Re Winding-Up Act and Canadian Tractor, &c., Co. W. B. Hooker's Case* (1914-5) 7 W. W. R. 562. Notice of a shareholders' meeting may be sufficient notice of allotment: *Traders Trust* v. *Goodman* (1917) 37 D. L. R. 31, 33, 43; *Alberta Rolling Mills* v. *Christie* (1919) 58 S. C. R. 208, 214. On the other hand it has been doubted whether notice of call is equivalent to notice of allotment: *Nasmith* v. *Manning* (1882) 5 S. C. R. 417; *Canadian Tin Plate Co., Morton's Case* (1906) 12 O. L. R. 594, 600. The entering of the subscriber's name on the register of shareholders is not sufficient to take the place of formal notice of allotment: *In re Universal Banking Corporation, Gunn's Case* (1867-8) 3 Ch. App. 40.

A notification by the secretary of the company that shares have been assigned to an applicant is not sufficient to make him a shareholder, when the authorization of the company or the allotment by the directors is not shown, even though the applicant's name is entered in the company's books: *Common* v. *Matthews* (1899) Que. 8 Q. B. 138.

Waiver of notice. Estoppel.

Allotment and notice thereof may be waived by acting as a shareholder and director: *Lake Superior*

Navigation Co. v. *Morrison* (1872) 22 U. C. C. P. 217. Though the applicant receive no notice of allotment he may be held to be estopped by his acts from setting up want of notice and actual notice may be imputed to him from circumstances, such as if he acts as a director: *Levita's Case* (1867) 3 Ch. App. 36; *Fletcher's Case* (1868) 37 L. J. Ch. 49; *Bird's Case* (1864) 4 D. J. & S. 200; or where he has executed a transfer of the shares: *Crawley's Case* (1869) 4 Ch. App. 322; or has paid one call on the shares: *Morden Woollen Mills* v. *Haeckels* (1908) 17 Man. R. 557. Allowing one's name to remain on the register and acting as owner of shares is sufficient: *Morrisburgh and Ottawa, &c.,* v. *O'Connor* (1915) 34 O. L. R. 161; and in *Re Gramm Motor, &c., and Bennett* (1915-6) 35 O. L. R. 224, it was held that Bennett by allowing his name to be put on the register to qualify as director and vice-president, voting and taking an active part in the company's affairs before shares standing in his name could be legally issued as paid up, thereby elected to take the shares with the liability attaching to them. Neither formal subscription nor allotment was necessary. See also *Traders Trust* v. *Goodman* (1917) 37 D. L. R. 31, where the subscriber attended meetings and gave proxies. Sect. 46.

Withdrawal of application.

Unless the application is under seal it may be withdrawn at any time before it has been accepted: *Re Canadian Tin Plate Decorating Co., Morton's Case* (1906) 12 O. L. R. 594; *Hodgins* v. *O'Hara,* 22 Occ. N. 29, 133; *Re Nipissing Planing Mills, Rankin's Case* (1909) 18 O. L. R. 80; *Kruger* v. *Horwood* (1907) 16 Man. R. 433.

Ordinarily communication by post of the allotment will be deemed to have been authorized and in such cases the contract is complete where a letter has been posted accepting the offer: *Harris' Case* (1872) L. R. 7 Ch. App. 587. Where notice of allotment is duly posted the applicant is bound even though the notice never reaches him: *Household Fire Ins. Co.* v. *Grant*

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(1879) 4 Ex. D. 216; *Northwest Battery* v. *Hargrave* (1913) 15 D. L. R. 193, 205. Even after shares have been allotted repudiation is in time if made and communicated to the company before notice of allotment has been posted, otherwise it is too late: *Byrne* v. *Van Tienhoven* (1880) 5 C. P. D. 344; *Harris' Case* (1872) L. R. 7 Ch. App. 587; *Stevenson* v. *McLean* (1880) 5 Q. B. D. 346; *Northwest Battery* v. *Hargrave* (1913) 15 D. L. R. 193. Repudiation is effective from the time when it reaches the company: *Henthorn* v. *Fraser* (1892) 2 Ch. 27.

Notice of withdrawal if given to the general agent of the company who procured the subscription will be sufficient notice to the company: *Kruger* v. *Horwood* (1907) 16 Man. R. 433; and see *Re Lake Ontario Navigation Co.* (1910) 20 O. L. R. 191, and *Re Publishers' Syndicate, Mallory's Case* (1902) 3 O. L. R. 552.

Withdrawal of application under seal.

In the case of an application under seal the Court of Appeal in Ontario has held that the offer to take shares could not be withdrawn and an attempted withdrawal before allotment was ineffectual: *Nelson Coke and Gas Co.* v. *Pellatt* (1904) 4 O. L. R. 481. In that case the document signed was in the following form:—"We, the undersigned, do hereby severally subscribe for and agree to take the respective amounts of the capital stock of the Nelson Coke and Gas Company, Limited, and of the class thereof set opposite to our respective names as hereunder and hereinafter written, and to become shareholders in said company to the said amounts, when and as the said stock so subscribed for by us severally shall be issued and allotted to us; and we do hereby severally covenant each with the other and others, with the said company, and the directors thereof, to accept the said stock when the same shall be allotted to us severally, and to pay for the same to the said company at par, when and as a call or calls for payment shall be made upon us severally by the directors.

"In witness whereof we have set our hands and seals this 1st day of September, 1899." Sect. 46.

It is not to be contended of course that a person who has subscribed under seal for shares is irrevocably bound to take them. He can not however successfully repudiate his subscription unless he can prove a case for rescission of the contract by the court: *Modern Bedstead* v. *Tobin* (1908) 12 O. W. R. 22, a decision of Boyd, C. Here the subscriber had signed the memorandum of agreement and stock book.

The *Pellatt Case* was followed in *Re Provincial Grocers, Limited, Calderwood's Case* (1905) 10 O. L. R. 705, although the decision really turned on another point. Here there was a subscription under seal for one share, the subscriber agreeing to pay $100 therefor as follows: 10 per cent. on application; 25 per cent. two months thereafter and the balance as the directors might deem advisable. Before any action had been taken by the company on the application, the subscriber wrote cancelling his subscription. The subscriber was drawn on for the 10 per cent. payable on application, but refused to accept the draft, and beyond entering his name in the list of shareholders the company thereafter did not treat him as a shareholder. It was held on these facts that the offer could not be withdrawn by the subscriber before acceptance, but that the company never intended to accept the subscriber as a shareholder unless ten per cent. was paid on application. It was further stated that even if the company had accepted the application there was a duty to communicate the acceptance to the subscriber, in the absence of which he could not be made liable as a shareholder.

Nelson Coke and Gas Co. v. *Pellatt* appears to be in conflict with the earlier case of *Nasmith* v. *Manning* (1880) 5 A. R. 126, (1880) 5 S. C. R. 417, where the subscription was under seal and in substantially the same form as in the *Pellatt Case*. The defendant without having purported to withdraw his subscription relied on absence of notice of allotment. It was held that the

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subscription, although under seal, was an offer merely which required acceptance by the company and which could be withdrawn at any time before allotment. Accordingly there was a duty upon the provisional directors to allot and give notice of allotment of the stock in a reasonable time, and this not having been done, the defendant was not liable as a shareholder.

In the Province of Manitoba it has been held that the fact of an application for shares in a company being under seal does not dispense with the necessity of a company accepting the offer and communicating its acceptance to the applicant to make a complete contract: *North-west Battery* v. *Hargrave* (1913) 23 Man. L. R. 923, 15 D. L. R. 193.

Repudiation of subscription after allotment.

Defences.

Even where an application has been duly made and accepted by the company and shares allotted, the applicant may be entitled to raise various defences to a claim by the company to hold him to his subscription; thus for example he may object

(1) That his subscription was obtained by fraud or misrepresentation.

(2) That his application was subject to a condition which has not been performed.

(3) That the company is not the company in which he intended to apply for shares.

(4) That the company has no shares which it can properly allot, or that it has allotted shares other than those subscribed for.

(5) That there has been total failure of consideration.

(6) That he is an infant.

1. Fraud or misrepresentation.

This defence has been already dealt with under s. 43 in so far as it arises out of misrepresentations contained in a prospectus, and the reader is referred to the notes to that section in which the cases are collected where this defence has been raised in the absence of or independently of a prospectus.

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Subscriptions of stock obtained by surprise, fraud and false statements of the affairs of the company made by its officers and directors are null and produce no obligation, and the shareholders, thus deceived, may even recover what they have paid on their shares: *The Glen Brick Company* v. *Shackwell* (1870) 1 R. C. 121.

Where the directors, finding that subscriptions have been obtained by improper representations, offer to cancel the certificates issued and return the money received, and such offer is accepted by the subscriber, the latter becomes a creditor of the company for the amount he had paid: *Re Civil Service Club, Furness, Withy & Co., Ltd.'s Claim* (1917-8) 13 O. W. N. 138.

See also *Provincial Insurance Co.* v. *Brown* (1860) 9 U. C. C. P. 286. The matter is further discussed in the notes to s. 43.

2. Conditional subscription.

An offer to take shares like any other offer may be absolute or conditional; in the latter case the condition may be a condition precedent or subsequent, or there may be a collateral agreement annexed to the application. If there is a condition precedent something is required to be done or some pre-requisite complied with before the contract becomes complete and the subscriber becomes a shareholder. In the case of a condition subsequent or of a collateral agreement, on the other hand, the intention is that the subscriber is to become a shareholder *in praesenti*.

Whether any arrangement entered into with regard to a subscription for shares is a condition precedent or a condition subsequent or a collateral agreement appears in every case to be a question of fact. If there is an undertaking that something is to be done in the future there may be a presumption against a condition precedent being intended: *Elkington's Case* (1867) 2 Ch. App. 511, 524.

Condition precedent.

Examples of conditions precedent may be found in the following cases: *Canadian Ohio Motor Co.* v.

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Cochrane (1914-5) 7 O. W. N. 698, affirmed (1915) 8 O. W. N. 242, where there was a requirement that a definite amount should be subscribed for before the applicant became bound.

In *Re Standard Fire Insurance Co., Turner's Case* (1885) 7 O. R. 448, T. gave a power of attorney to C. to subscribe for shares only to be used if T. became a director. C. directed an officer of the company to enter T.'s name on the list of shareholders which was done, but T. was never made a director. On receipt of a notice of call on his shares T. at once repudiated his liability and it was held that he had not become a shareholder. See also *Re Great Northern Assurance Co., Black's Case* (1915) 25 D. L. R. 703, 25 Man. R. 670; *Monarch Life* v. *Brophy* (1907) 14 O. L. R. 1; *Mallory's Case* (1902) 3 O. L. R. 552; *Edge* v. *Security Life Ins. Co.* (1912) 8 D. L. R. 492.

Condition subsequent or collateral agreement.

In the following cases it was held that there was only a condition subsequent or a collateral agreement:

Caston's Case (1885) 7 O. R. 448; 12 A. R. 486; (1886) 12 S. C. R. 644, where the defendant subscribed for shares on the understanding that he was to be solicitor for the company, that he was to pay no cash for his shares but that his remuneration as solicitor was to be credited on them.

Re Wiarton Beet Root Sugar Co., Jarvis's Case (1905) 5 O. W. R. 542, where the arrangement that the subscriber should pay for his shares in goods to be supplied was held to be a collateral agreement. See also *Elkington's Case* (1867) 2 Ch. App. 511; *Sherrington's Case* (1885-6) 31 Ch. D. 120; *Bridger's Case* (1870) 5 Ch. App. 305; *Alberta Rolling Mills Co.* v. *Christie* (1919) 58 S. C. R. 208; *Hamilton* v. *Stewiacke* (1897) 30 N. S. R. 166; *Barret* v. *Bank of Vancouver* (1917) 36 D. L. R. 158; *Re Monarch Bank of Canada, Murphy's Case* (1918-9) 45 O. L. R. 412, affirmed by Supreme Court of Canada sub nom. *Murphy* v. *Clarkson* (1920) 17 O. W. N. 295 (agreement to appoint subscriber a director).

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Notwithstanding a condition subsequent which is unfulfilled a subscriber may become a *de facto* shareholder where he has retained the shares and given proxies to vote thereon: *Alberta Rolling Mills* v. *Christie, supra.*

Non-compliance with condition.

The company is not entitled to allot shares in disregard of a condition imposed by the applicant: *Ottawa Dairy Company* v. *Sorley* (1906) 34 S. C. R. 508. If a subscription is subject to a condition precedent the subscriber does not become a shareholder unless the condition is fulfilled: *Re Great Northern Assurance Co.* (1915) 25 D. L. R. 703, 25 Man. L. R. 670. In the case of a condition subsequent, on the other hand, the subscriber may be entitled to a right of action for indemnity or damages against the company, but he cannot repudiate his liability as a shareholder: *Clarke* v. *Union Fire Insurance Co., Caston's Case* (1884) 10 P. R. 339. If the company is still a going concern, so that the rights of creditors do not arise, a person who has subscribed for shares on an express condition, *e.g.*, that business would be commenced and the subscriber would receive a definite appointment, is entitled to rescission of the agreement, and the return of his money if the condition is not fulfilled: *International Casualty Co.* v. *Thompson* (1913) 11 D. L. R. 634. See also *Re Winding-Up Act* and *Canadian Tractor, &c., Co., W. B. Hooker's Case* (1914-5) 7 W. W. R. 562. The right to rescind is however lost if a winding-up has intervened: *Re Standard Fire Insurance Co., Caston's Case* (1886) 12 S. C. R. 644; *Fisher's Case* (1885-6) 31 Ch. D. 120, 128; *Brownlee* v. *Hyde* (1906) Que. 15 K. B. 221; *Barrett* v. *Bank of Vancouver* (1917) 36 D. L. R. 158. A stipulation in a subscription that the amount unpaid is to be satisfied by the application of dividends will not avail against a liquidator: *Re Investors, Ball's Case* (1918) 3 W. W. R. 180. A condition subsequent or collateral agreement by which under certain circumstances a subscriber is entitled to surrender the shares and demand the return

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of his money is *ultra vires* as involving an illegal reduction of the company's capital: *Alberta Rolling Mills* v. *Christie* (1919) 45 D. L. R. 545; 58 S. C. R. 208. That case was one decided in relation to a company governed by the Alberta Companies Ordinance, which contains strict provisions as to the conditions on which and the methods by which the company's capital may be reduced. And while Middleton, J., in *Re Port Arthur Wagon Co., Tudhope's Case* (1919) 45 O. L. R. 260, suggests that an agreement to surrender by a Dominion company may not be *ultra vires,* it may be observed that provisions similar to those of the Alberta Companies Ordinance, above referred to, were in 1917 incorporated in the Dominion Act. See s. 54.

Evidence of existence of condition, or collateral agreement.

A condition precedent need not appear in the application itself. In *Monarch Life* v. *Brophy* (1907) 14 O. L. R. 1, where the defendant signed a printed form of application and it was admitted that this did not represent the whole agreement, the Court went into the evidence which established a condition precedent. See also *Re Canadian McVicar Engine Co.* (1909) 13 O. W. R. 916; *In re Publisher's Syndicate, Mallory's Case* (1902) 3 O. L. R. 552; *Re Globe Fire Assurance Co., Robertson's Case* (1909) 11 W. L. R. 45, 293; 2 Sask. R. 266; *In re Victor Wood Works* (1908-9) 43 N. S. R. 368; *The Silliker Car Co.* v. *Evans,* (1909) 7 E. L. R. 560; *Carter* v. *C. N. R.* (1911) 32 O. L. R. 140; *Ontario Ladies College* v. *Kendry* (1906) 10 O. L. R. 324. In the last mentioned case the company's agent who had obtained the subscription having died before the commencement of the action the uncorroborated evidence of the subscriber that the written agreement was made subject to a contemporaneous oral agreement was accepted in the absence of facts indicating the contrary.

Where the written subscription states that it is made unconditionally oral testimony will not be admitted to establish the contrary: *St. Roch Hotel Co.* v. *Barbeau* (1915) 48 Que. S. C. 94.

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Nor where a winding-up has intervened will evidence of a condition subsequent be admitted whereby creditors would be prejudiced: *Hamilton* v. *Holmes* (1900-1) 33 N. S. R. 100, footnote. See also *Caston's Case* (1886) 12 S. C. R. 644, 647; *Brownlee* v. *Hyde* (1906) 15 Que. K. B. 221.

The subscriber should prove that the condition sought to be annexed to the subscription has been brought to the notice of the company: *Harrison's Case* (1868) 3 Ch. App. 633, 638; In *Re Publishers' Syndicate, Mallory's Case* (1902) 3 O. L. R. 552.

A collateral agreement may be bad because made by a person, *e.g.*, a provisional director, who is not entitled to bind the company thereby: *Wilson* v. *Ginty* (1878-9) 3 A. R. 124, 129.

Waiver of condition.

If the subscriber does not repudiate his subscription after notice of allotment before the condition has been complied with he will be liable as a shareholder: *Wheatcroft's Case* (1873) 29 L. T. 324.

A condition may be waived by conduct, *e.g.*, if the subscriber attends meetings, acts as director, executes transfers of his shares, makes payments thereon or does other acts which show that he has assumed the position of shareholder. See *Kingston Street Railway* v. *Foster* (1886) 44 U. C. R. 552; *Wiarton Beet Root Sugar Mfg. Co., Alexander McNeill's Case* (1905) 10 O. L. R. 219; *Rankin* v. *Hop & Malt Exchange, &c., Co.* (1869) 20 L. T. 207; *Perrett's Case* (1873) 15 Eq. 250; *Re Lake Ontario Navigation Co., Davis's Case* (1910) 20 O. L. R. 191. See also *Bank of Hamilton* v. *Johnston* (1906) 7 O. W. R. 111; *In re Victor Wood Works, Ltd.* (1908-9) 43 N. S. R. 368; *Barrett* v. *Bank of Vancouver* (1917) 36 D. L. R. 158, 160. There must be full knowledge to admit of waiver; and there can be no waiver where the acts of the subscriber which are relied on are done in the belief that the condition has been fulfilled: *Canadian Ohio Motor Co.* v. *Cochrane* (1914-5) 7 O. W. N. 698, affirmed (1915) 8 O. W. N. 242.

3. That the company is other than the one in which shares were applied for.

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Where a person applies for shares in a company believing it to be a totally different company there is no contract and the subscriber is entitled to repudiate: *Baillie's Case* (1898) 1 Ch. 110. As no contract has been entered into the subscriber will be entitled to have his name removed from the list of contributories even though he takes no steps in that direction prior to the winding up. Where payments had been made under a mistake of fact, the subscribers thinking they were paying, as they had subscribed, to a different company, it was held that they were not bound: *In re Victor Wood Works* (1908-9) 43 N. S. R. 368. See also *Re Port Arthur Wagon Co., Smyth's Case* (1919) 57 S. C. R. 388.

4. No shares created which can properly be allotted.

In *Manes Tailoring Co.* v. *Willson* (1907) 14 O. L. R. 89, it was held that there being no shares of the kind specified which could have been allotted to the defendant, there had been a total failure of consideration for a note given by the defendant in payment and he was not liable thereon. If preferred shares are applied for and the shares allotted are common shares, in the absence of conduct which would estop the subscriber from claiming that the company was in a position to give him preference shares he can set this defence up against a liquidator seeking to make him a contributory: *Re Banker's Trust Co. & Barnsley* (1915) 21 D. L. R. 623, 21 B. C. R. 130; *Banker's Trust* v. *Okell* (1916) 27 D. L. R. 63; *Re Pakenham Pork Packing Co.* (1905) 12 O. L. R. 100.

So also as regards shares purporting to have been created on an increase of capital illegally effected: *In Re Ontario Express and Transportation Co.* (1894) 21 A. R. 646. See also *Union Bank* v. *Gourlay* (1916) 31 D. L. R. 565; (1917) 35 W. L. R. 935 on estoppel of subscriber.

5. Total failure of consideration.

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If shares have been subscribed for on the basis of an arrangement which subsequently becomes impracticable and is abandoned so that the whole consideration for the subscription is gone, the subscriber is entitled to be relieved and recover back anything he may have paid on the shares: *The Bullion Mining Co.* v. *Cartwright* (1905) 10 O. L. R. 438, but not where the shareholder was one of the original incorporators: *Giguere* v. *Colas* (1915) 48 Que. S. C. 198. So also where the shares were not and could not have been delivered: *Sovereign Bank* v. *McIntyre* (1909-10) 1 O. W. N. 254.

6. Infancy.

The contract of an infant to take shares, like other voidable contracts of an infant, is valid until repudiation, which in order to be effective must take place within a reasonable time after the attainment of majority. Laches or acquiescence or an affirmation of the position of shareholder after majority will leave the former infant liable as a contributory in a winding-up: *Re Sovereign Bank of Canada, Clark's Case* (1915-16) 35 O. L. R. 448; *Re Prudential Life Insurance Co.; Re Paterson* (1918) 1 W. W. R. 105 (receipt of a dividend).

If an infant is a shareholder when winding-up commences, or if he is not then precluded from repudiating his shares, he does not lose that right by mere delay: *Re Central Bank and Hogg* (1890) 19 O. R. 7.

Where shares have been transferred to an infant by way of gift, and he effectually repudiates the shares, they re-vest in the donor: *Re Sovereign Bank of Canada, Barnes's Case* (1916-7) 11 O. W. N. 103.

Preference Shares.

Preference stock.

47. The directors of the company may make by-laws for creating and issuing any part of the capital stock as preference stock, giving the same such preference and priority, as respects dividends and in any other respect, over ordinary stock as is by such by-laws declared.

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Provisions as to control of affairs.

2. Such by-laws may provide that the holders of shares of such preference stock shall have the right to select a certain stated proportion of the Board of Directors, or may give them such other control over the affairs of the company as is considered expedient. 2 E. VII., c. 15, s. 38.

By-law to be sanctioned.

48. No such by-law shall have any force or effect whatever until after it has been sanctioned by a vote of three-fourths of the shareholders, present in person or by proxy at a general meeting of the company duly called for considering the same and representing two-thirds of the stock of the company, or until the same shall be unanimously sanctioned in writing by the shareholders of the company. 2 E. VII., c. 15, s. 38.

Rights and liabilities of holders of preference stock.

49. Holders of shares of such preference stock shall be shareholders within the meaning of this Part, and shall in all respects possess the rights and be subject to the liabilities of shareholders within the meaning of this Part: Provided that in respect of dividends, and in any other respect declared by by-law as authorized by this Part, they shall, as against the ordinary shareholders, be entitled to the preferences and rights given by such by-law. 2 E. VII., c. 15, s. 38.

Procedure.

1. **Where preference shares are created by by-law.**
2. **Where preference shares are created by letters patent.**

Note on preference shares.

(a) **Preference as to dividends.**
   1. **Payment out of capital.**
   2. **Cumulative dividend.**
   3. **Participating.**

(b) **Preference as to return of capital or distribution of surplus in a winding-up.**

(c) **Rights as to control or interference in the management of the company's affairs.**

(d) **Exchange of preference shares for shares of a different class—Redemption.**

The Imperial Act contains no clause dealing specifically in terms with this power, and the whole scope of the act in that regard is so different from the Canadian acts that the English decisions must be applied with great caution.

Compare Imperial Act, 1862, ss. 8 and 50, and Companies (Consolidation) Act, 1908, ss. 3 and 13, and the following cases: Secs. 47-49.

Harrison v. *Mexican Rail. Company* (1875) L. R. 19 Eq. 358; *Ashbury* v. *Watson* (1885) 30 Ch. D. 376; *Andrews* v. *Gas Meter Co.* (1897) 1 Ch. 361; *Re Jas. Colmer, Limited* (1897) 1 Ch. 524.

The powers, rights and privileges of the holders of preference shares may be very widely varied so that on the one hand they approach towards the rights of debenture holders and on the other hand may be little different from the rights of ordinary shareholders.

Procedure.

1. Where preference shares are created by by-law.

A by-law must first be passed by the directors creating the preference shares. The by-law should state a specified number of shares to be issued as preference shares and should make certain not only the amount of preference shares but also the amount of common shares: *Manes Tailoring Co.* v. *Willson* (1907) 14 O. L. R. 89. See the same case also as to the distinction between by-laws and resolutions.

A meeting of shareholders must then be called for the purpose of ratifying the by-law, or the by-law may be unanimously sanctioned in writing by all the shareholders under s. 48. If the latter plan is adopted the by-law as it appears in the directors' minute book should be signed by all the shareholders under an endorsement stating the fact of its sanction and the date thereof.

Section 48 of the Act does not expressly authorize the modification by the shareholders of the by-law and its adoption as revised. However, it is submitted that this may be done, and accordingly it is advisable that the notice calling the meeting of shareholders should make proper provision for this purpose.

If the by-law is ratified by resolution at a shareholders' meeting, in order to comply with the Act

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it is necessary (a) that two-thirds of the stock of the company should be represented. Section 48 does not state whether nominal capital stock or issued capital stock is intended. But it is submitted that the latter is the case and this view corresponds with the prevailing practice of confirming the preference stock by-law during the organization stage of the company when only the incorporators' shares have as yet been issued; (b) That three-fourths of the voting power represented at the meeting should be exercised in favor of the by-law. In view of the somewhat loose wording of s. 48 it is advisable that a ballot should be taken and the actual number of votes, including those cast by shareholders holding proxies for absentees, duly recorded. The minutes of the meeting should, of course, also show the number of shares held by each shareholder present and the number of shares in respect of which proxies are held, the person by whom the proxies are held and the name of the shareholder giving the proxies.

It is essential that the formalities prescribed by the Act should be rigidly complied with. Thus in a case decided under the analogous provisions of s. 22 R.S.O. c. 191, where the shareholders of a company passed a resolution in favor of the creation of preference stock with a direction to the directors to pass a by-law, which the directors failed to do, it was held that no preference stock had been validly created: *Re Pakenham Pork Packing Co.* (1905) 12 O. L. R. 100. See especially the judgment of Moss, C.J.O., at p. 109. See also *Re Bankers' Trust Co. and Barnsley* (1915) 21 D. L. R. 623.

In *Manes Tailoring Co.* v. *Willson* (1907) 14 O.L. R. 89, the action of the directors in creating the preferred stock was in form of a resolution which was confirmed by the shareholders. Magee, J., held that the corresponding provision of the Ontario Companies Act, R S. O. (1897) c. 191, s. 22 required a by-law to be passed first by the directors and then confirmed by the shareholders, thus prescribing consideration twice, and by two different bodies, acting in different capacities. See

further *Bartlett* v. *Bartlett Mines Limited* (1911) 24 O. L. R. 419, and cases there cited.

2. Where preference shares are created by letters patent.

In this connection section 8 of the Act should be referred to, which is as follows:—

"8. The application shall be in accordance with form A. in the schedule to this Act and may ask to have embodied in the letters patent then applied for, any provision which could under this part be contained in any by-law of the company or of the directors approved by a vote of shareholders, which provision so embodied shall not, unless power is given therefor in the letters patent, be subject to repeal or alteration by any by-law. 2 E. VII. c. 15, s. 7."

The above section in effect provides a second method of creating preference shares, *i.e.*, instead of passing a by-law sanctioned by the shareholders conformably to ss. 47 and 48, the letters patent themselves may create the preference shares and provide for the amount thereof and the terms on which they are to be issued, and the respective rights of the holders of preference and common shares. If the rights of the shareholders are fixed by the letters patent they cannot subsequently be modified by by-law unless the letters patent themselves provide for such modification as stated in section 8. As to preference shares of a company subject to s. 7B, see that section.

If the letters patent so provide the advantage arising from fixing the rights of preference shareholders by defining them in the letters patent disappears, and, accordingly, where provision is desired to be made for altering the rights of preference shareholders, *e.g.*, through raising fresh capital by the issue of new preference shares having a special priority over the first issue, it will be found convenient to create the issue by by-law under the provisions of ss. 47 and 48.

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Prospectus.

If it is proposed to issue a prospectus this document should state the respective amounts of common and preference shares and set out succinctly the provisions relating to the latter.

Share certificates.

Where a company issues shares of more than one class it is desirable that the common share certificates should show both the amount of authorized common and preference share capital and the par value of the shares into which each class is divided. The preference share certificates should in addition state on their face the rate of dividend, the fact whether it is cumulative, participating, &c., and the restrictions, if any, imposed on the holders of preference shares.

If the restrictions are lengthy they may be referred to on the face of and set out on the reverse side of the certificate.

Note on preference shares.

It is common knowledge that preferred stock is not the same as common stock in dividends, in distribution of assets and perhaps as to voting. See *Re Queen City Refining Co.* (1885) 10 O. R. 264, as explained in *In re London Speaker* (1889) 16 A. R. 508, per Britton, J., in *Port Arthur Wagon Co.* (1916) 9 O. W. N. 383.

The preference or priority conferred on the holders of preference shares may include one or more of the following:

(a) Preference as to dividends, and the right to receive a bonus or participate in dividends after a specified dividend has been paid on common shares.

(b) Preference as to return of capital in a winding up and distribution of surplus assets.

(c) Rights as to the control of or interference in the management of the company's affairs.

(d) The right to exchange preference shares for common shares of an equal amount.

These are the more ordinary incidents of preference shares, but do not exhaust the preferences or priorities that may be granted.

The question has not arisen for determination as to whether these sections permit the issue of shares preferred in certain respects but deferred in others,

that is conferring on the holders rights less than the ordinary rights of shareholders. For example, issuing shares preferred as to dividends but withholding all power to vote at the election of directors unless their shares are in default. Secs. 47-49.

It is submitted, however, in view of the provisions of s. 49 which state that the holders of preference shares shall in all respects possess the right of shareholders, that possibly the right to vote can not be taken away altogether, and that it is doubtful whether the ordinary voting right which every shareholder possesses can be cut down in the case of a preference shareholder. See *infra*, p. 260.

It is *ultra vires* to provide that the company shall at the option of the holders of preference stock accept a surrender of the shares and repay the amount thereof: *Long* v. *Guelph Lumber Co.* (1880) 31 U. C. C. P. 129. The preference conferred by the Act is over ordinary shares and not as against creditors. Such a priority is the privilege of a mortgagee or debenture holder, not a shareholder as such; see *In re Tonquoy Gold Mining Co.* (1906) 1 E. L. R. 142.

(a) Preference as to dividends.

1. Payment out of capital.

A company cannot contract to pay interest of dividends on its shares regardless of whether there are profits available: *Long* v. *Guelph Lumber Co.* (1880) 31 U. C. C. P. 129; *Re Sharpe* (1892) 1 Ch. 154; see also *Dent* v. *London Tramways* (1880) 16 Ch. D. 344. But where the preference clause stated "the company guarantees 8 per cent. yearly to the extent of the preference stock," it was held that the proper construction of this clause was not that interest was to be paid in any event and so payable out of capital, but only if there were profits out of which it could be paid and accordingly the clause was held *intra vires*: *Long* v. *Guelph Lumber Co., supra.*

Under the Imperial Act it has been held that, where convertible debenture stock has been issued, the inter-

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est thereon may be made chargeable to capital account during the construction of the company's works, being treated as part of the cost of construction: *Hinds* v. *Buenos Ayres Grand National Tramways* (1906) 2 Ch. 654, and under s. 69 (c) of the Act debenture stock can be created, which is a form of loan capital and not at all in the nature of preference shares.

2. Cumulative dividend.

The dividend may be made cumulative, so that, if there are no profits available in any particluar year out of which to pay the dividend on the preference shares, such dividend is carried forward and becomes together with subsequent dividends a charge on the first profits of the company available for distribution. And a preferential dividend, in the absence of words limiting the preference, is *prima facie* cumulative and means a dividend having preference over the whole income of the company during the whole period of its existence or during as many years as may be necessary to satisfy the claim of dividend; per Lord McLaren in *Miln* v. *Arizona Copper* (1899) 36 Sc. L. R. 741. See also *Crockett* v. *Academy of Music* (1902) 22 Occ. Notes 201. If, on the other hand, the preference shareholders are declared to be entitled to be paid their dividend out of the net profits of each year, the dividend is not cumulative: *Staples* v. *Eastman Photographic Materials* (1896) 2 Ch. 303, C. A.

3. Participating.

If it is desired to confer on preferred shareholders the right to participate further in the profits of the company after payment of the fixed preferential dividend it must be so distinctly stated; otherwise the right is impliedly negatived: *Will* v. *United Lanket Plantation Company* (1912) 2 Ch. 571. See also *Re National Telephone Co. Ltd.* (1914) 1 Ch. 755.

(b) Preference as to return of capital or distribution of surplus in a winding-up.

A preference as to dividend does not carry with it a similar preference as to return of capital or distri-

bution of surplus in a winding-up: *In re London India Rubber Co.* (1867-8) 5 Eq. 519. The general rule, which it requires an express provision to exclude, is that both classes of shareholders rank pro rata: *Morrow* v. *Peterborough Water Co.* (1901) 4 O. L. R. 324 at p. 329. Where it is desired to confer such a right, apt words must be inserted in the by-law or the letters patent creating the issue. If the right to a priority in return of capital exists, the preference shareholders, in the absence of any provision to the contrary, are also entitled to participate rateably with the other shareholders in the distribution of any surplus assets that may be available for such purpose: *In re Espuela Land and Cattle Co.* (1909) 2 Ch. 187. Secs. 47-49.

Where the dividend is cumulative, and it is provided that the surplus assets in the event of a winding up are to be applied, first in repaying the preference capital, and secondly, in paying off arrears (if any) of the preferential dividend to the commencement of the winding-up, the preference shareholders are entitled to payment of arrears of dividend out of surplus assets, even though no dividends have been actually declared: *In re New Chinese Antimony Co.* (1916) 85 L. J. Ch. 429. Semble, it is immaterial whether there were profits or not, *ibid.*; and see *W. J. Hall & Co.* (1909) 1 Ch. 521.

(c) Rights as to the control of or interference in the management of the company's affairs.

The preference by-law may give the preference shareholders "the right to select a certain stated proportion of the board of directors" or such other control over the affairs of the company as is considered expedient" (s. 47).

The provision enabling the preference shareholders to elect a stated number of directors is frequently taken advantage of, especially by the insertion of a clause in the by-law to the effect that the right shall become exercisable on default in payment of the preference dividend. The general rule is that

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each shareholder is entitled to one vote for every share held by him (sec. 88 (b)) but this rule may be excluded or modified by the by-laws (s. 88.) In the absence of a provision in the British Columbia Companies Act of 1890, similar to sec. 88, it was held that a clause in the memorandum of association purporting to enable the holders of a specified block of shares to elect three out of five directors was null and void, the shares being held not to be preference shares within the meaning of the statute: *Colonist Printing and Publishing Co.* v. *Dunsmuir* (1902) 32 S. C. R. 679.

Whether, conversely, the preference by-law may cut down the ordinary voting rights of shareholders is not free from doubt. Section 49 on the one hand provides that holders of preference shares shall enjoy the rights of shareholders, and section 88 on the other hand indicates that such rights may be modified by by-law. In the absence of authority it is submitted that the preference by-law creating the issue or the by-laws in existence at the time of the issue, provided the restrictions are brought to the notice of the preference shareholders at the time of subscription, may limit their voting power either as to the *quantum* or subject matter. If, however, it were sought subsequently to limit such voting power by by-law passed with the help of a majority of the holders of common shares, there is little doubt that the Courts would at the instance of preference shareholders, whose rights were thus infringed, afford relief.

(d) Exchange of preference shares for shares of a different class—Redemption.

Bonds are frequently issued on the basis that bondholders at their option may exchange their bonds for fully paid shares, and it may similarly be desirable to confer on preference shareholders the right to exchange their shares for common shares of the like amount. As, however, shares once issued cannot be cancelled it is difficult to see how any authorization for such an exchange can be found in the act. There

is this further difficulty that such cancellation would have the effect of reducing the capital of the company. Thus, if there is an authorized share capital of $300,000 divided into 1000 preference and 2000 common shares, the effect of permitting a preference shareholder to exchange his shares for common shares would be to reduce the nominal capital of the company *pro tanto*. This requires the authority of supplementary letters patent (ss. 54-56). Doubtless the same applies to the exercise of an option to redeem preference shares contained in the by-law authorizing the issue. Secs. 47-49.

50. The company shall not be bound to see to the execution of any trust, whether express, implied or constructive, in respect of any share. Execution of trusts.

2. The receipt of the shareholder in whose name the same stands in the books of the company shall be a valid and binding discharge to the company for any dividend or money payable in respect of such share whether notice of such trust has been given to the company or not. Receipt of shareholder as a discharge.

3. The company shall not be bound to see to the application of the money paid upon such receipt. 2 E. VII., c. 15, s. 39. Application of money.

The operation of such a provision as the above has not yet been fully determined. It does not prevent a person equitably interested in shares from procuring the intervention of the court to protect his rights: *Binney* v. *Ince Hall Coal Co.* (1886) 35 L. J. Ch. 363; *Taylor* v. *Midland Ry Co.* (1866) 8 W. R. 401.

The rule apart from statute is that a company is bound to protect the rights of a beneficial owner of shares which stand in its books in the name of a trustee or where it has notice that the shares are held in trust.

The section alters the law as regards trusts of which the company has notice; if the company has no notice of the trust it is of course not bound and does not require the protection of the section.

The existing Imperial Act, s. 27, and the corrsponding section of the Companies Act of 1862, viz., s. 30, contain a somewhat different provision as follows: "No notice of any trust, express, implied or con-

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structive, shall be entered upon the register, or receivable by the registrar, etc.,'' but in so far as the cases decided under these sections deal with the liability of the company to see to the execution of trusts they would appear to be applicable.

The section is a shield, not a sword, and where shares are held by a shareholder in trust the company is not entitled to accept a mortgage to it of the shares by the trustee in derogation of the rights of the *cestui que trust: Birkbeck Loan Co.* v. *Johnston* (1902) 3 O. L. R. 497. As Street, J., said in that case at p. 507, dealing with the corresponding section, 53 of R. S. O. 1897, the Act '' relieves the company from the duty of seeing to the execution of any trust, to which any shares are subject and enables it to pay money to a shareholder who holds shares upon any trust without seeing that the money is properly dealt with by the shareholder after receiving it, but it goes no further. It does not entitle the company to lend money to A. with express notice that he is mere trustee for B.''

The judgment was varied on appeal to the Court of Appeal (1903) 6 O. L. R. 258, but the Court did not dissent from the above statement of the law by Street, J.

It is perhaps not altogether free from doubt whether the directors of the company will be personally liable if they allow a transfer to be registered in contravention of equitable rights of which they have actual notice. In *Société Générale de Paris* v. *Tramways Union Company* (1884) 14 Q. B. D. 424, a case decided on the provisions of section 30 of The Imperial Companies Act (1862), Cotton, L.J., and Lindley, L. J., in the Court of Appeal, thought that directors might be liable; Brett, M.R., was doubtful. The point was not dealt with by the House of Lords where the decision of the Court of Appeal was affirmed *sub. nom. Société Générale* v. *Walker,* 1 App. Cas. 20. The question of the applicability of the section has arisen in connection with the registration of executors or other persons at their request in the case of a death

of a shareholder. Thus, it has been held under the corresponding section of the Bank Act then in force, R. S. C. (1886) c. 120, s. 29, that, as on the death of the shareholder the title to the shares vests in his personal representatives, the bank could not refuse to register a transfer to a purchaser by an executor though the will of the testator specifically bequeathed the shares in question; nor was the assent of the legatee necessary: *Boyd* v. *The Bank of New Brunswick* (1891) N. B. Equity Cases 546. Similarly, where the will whereby the shares in question were bequeathed directed the substitution of the legatee's lawful issue at his death and the corporation, relying on a similar section (s. 36 of 18 Vict. (Can.) c. 202), permitted an absolute transfer, which allowed the rights of the issue to be defeated, it was held that this was permissible in the absence of actual knowledge of a breach of trust: *Simpson* v. *Molson's Bank* (1895) A. C. 270. Sect. 50.

See also the note to ss. 64 ff. on transfer of shares.

A clause similar to the above section is frequently inserted in articles of association of companies incorporated under the Imperial Companies Act or similar acts, and is known as the "Exemption Clause." Its object is to relieve the company from the necessity of taking notice of equitable interests in shares and to preclude persons claiming under equitable titles from converting the company into a trustee for them. Where the articles of association contained an exemption clause it was held that the company's lien upon shares for all claims against the holder was available against a shareholder who was merely a trustee for others for debts due from him personally: *New London & Brazilian Bank* v. *Brocklebank* (1882) 21 Ch. D. 302, see also *Re Perkins* (1890) 24 Q. B. D. 613.

As regards the position of a transferee of a holder of shares "in trust" he is bound to enquire whether the transfer is authorized by the nature of the trust: *Sweeney* v. *Bank of Montreal* (1887) 12 A. C. 617 affirming (1885) 12 S. C. R. 661; see also *Raphael* v. *McFarlane* (1890) 18 S. C. R. 183. But the words

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"Manager in Trust," appended to the signature of a bank manager, import that he held and transferred shares in trust for his employers, the bank, and are not calculated to suggest that he stood in a fiduciary relation to some other person so as to affect a transferee for value with constructive notice of such relationship: *London & Canadian Loan, etc., Company* v. *Duggan* (1893) A. C. 506. See also *Wilson* v. *B. C. Refining Co.* (1915) 22 D. L. R. 634, where the English cases are collected.

Increase or Reduction of Capital, etc.

By-law to consolidate shares.

51. The directors of the company may at any time, whenever the par value of the existing shares of the company is less than one hundred dollars each, make a by-law consolidating them into shares of a larger par value; but no such consolidated share shall exceed the par value of one hundred dollars.

Purchase of fractions of shares by company.

2. For the purpose of such consolidation, the company shall have the power to purchase fractions of shares, and shall be bound to sell any shares held from such purchases, within two years after the purchase.

By-law for subdivision of shares.

3. The directors of the company may also, at any time, make a by-law subdividing the existing shares into shares of a smaller amount. 2 E. VII., c. 15, s. 40; 4 E. VII., c. 5, s. 2.

Increase of capital.

52. The directors of the company may, at any time after ninety per centum of the capital stock of the company has been taken up and fifty per centum thereon paid in, make a by-law for increasing the capital stock of the company to any amount which they consider requisite for the due carrying out of the objects of the company.

By-law to increase capital to be approved and confirmed.

2. No by-law for increasing or reducing the capital stock of the company, or for subdividing the shares, shall have any force or effect whatsoever, until it is approved by the votes of shareholders representing at least two-thirds in value of the subscribed stock of the company at a special general meeting of the company duly called for considering the same, and afterwards confirmed by supplementary letters patent. 2 E. VII., c. 15, ss. 41 and 43.

By-law to allot stock.

53. Such by-law shall declare the number of the shares of the new stock, and may prescribe the manner in which the same shall be allotted.

Directors allot when.

2. In default of the manner of the allotment of the shares of the new stock being prescribed by such by-law, the control of such allotment shall vest absolutely in the directors. 2 E. VII., c. 15, s. 41.

Reduction of Share Capital. Sect. 54.

By-law for reduction of share capital.

54 (1) Subject to confirmation by supplementary letters patent, a company may by by-law reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may:—

(*a*) Extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or,

(*b*) Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or,

(*c*) Either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company;

and may reduce the amount of its share capital and of its shares accordingly.

(2) No by-law for reducing the capital stock of the company shall have any force or effect whatsoever, until it is approved by the votes of shareholders representing at least two-thirds in value of the subscribed stock of the company at a special general meeting of the company duly called for considering the same, and afterwards confirmed by supplementary letters patent. 2 E. VII., c. 15, ss. 41 and 43; 7-8 Geo. V., c. 25, s. 8.

Addition to name of company of "and reduced."

54A. On and from the confirmation by a company of a by-law for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, then on and from the presentation of the petition for supplementary letters patent confirming the reduction, the company shall add to its name, until such date as the Secretary of State of Canada may fix, the words "and reduced," as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company: Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Secretary of State of Canada may, if he thinks expedient, dispense altogether with the addition of the words "and reduced." 7-8 Geo. V., c. 25, s. 8.

Objections by creditors, and settlement of list of objecting creditors.

54B. (1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Secretary of State of Canada so directs, every creditor of the company who at the date of the petition for supplementary letters patent to the Secretary of State of Canada is entitled to any debt or claim which, if that

Sect. 54B. date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2) The Secretary of State of Canada shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

(3) Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Secretary of State of Canada may, if he thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Secretary of State of Canada may direct, the following amount, that is to say,—

(i) If the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

(ii) If the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Secretary of State of Canada after the like inquiry and adjudication as if the company were being wound up. 7-8 Geo. V., c. 25, s. 8.

Order confirming reduction.

54C. The Secretary of State of Canada, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may issue supplementary letters patent confirming the reduction on such terms and conditions as he thinks fit. 7-8 Geo. V., c. 25, s. 8.

Liability of members in respect of reduced shares.

54D. (1) A shareholder of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the supplementary letters patent;

Provided that if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is

unable, within the meaning of the provisions of the Winding-up Act to pay the amount of his debt or claim, then,— Sect. 54D. R.S., c. 144.

(i) every person who was a shareholder of the company at the date of the supplementary letters patent shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before the date of the supplementary letters patent; and,

(ii) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding-up.

(2) Nothing in this section shall affect the rights of the contributories among themselves. 7-8 Geo. V., c. 25, s. 8.

54E. Any director, manager, or officer of the company who wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or aids or abets in or is privy to any such concealment or misrepresentation, is guilty of an indictable offence and liable to five years' imprisonment or to a penalty not exceeding one thousand dollars, or to both such imprisonment and such penalty. 7-8 Geo. V. c. 25, s. 8. Penalty for concealment of name of creditor.

54F. In any case of reduction of share capital the Secretary of State of Canada may require the company to publish, as he directs, the reasons for reduction, or such other information in regard thereto as he may think expedient with a view to give proper information to the public, and, if he thinks fit, the causes which led to the reduction. 7-8 Geo. V., 1917, c. 25, s. 8. Publication of reasons for reduction.

55. At any time, not more than six months after the approval of a by-law for increasing or reducing the capital stock of the company, or for subdividing the shares, the directors may apply to the Secretary of State for the issue of supplementary letters patent to confirm the same. 2 E. VII., c. 15, s. 44. Supplementary Letters to confirm by-law.

56. The directors shall, with such application, produce a copy of such by-law, under the seal of the company, and signed by the president or vice-president, and the secretary, and establish to the satisfaction of the Secretary of State, the due passage and approval of such by-law and the expediency and bona fide character of the increase or reduction of capital or subdivision of shares, as the case may be, thereby provided for. Evidence with application.

Sect. 56.

Evidence, how taken.

2. The Secretary of State shall, for that purpose, take any requisite evidence in writing, by oath or affirmation or by solemn declaration, and shall keep of record any such evidence so taken. 2 E. VII., c. 15, s. 44.

Granting of the letters.

57. Upon the due passage and approval of such by-law being so established, the Secretary of State may grant such supplementary letters patent.

Notice.

2. Notice of the granting of such letters patent shall be forthwith given by the Secretary of State in the *Canada Gazette,* in the form E in the schedule to this Act.

Effect of letters.

3. From the date of such supplementary letters patent, the capital stock of the company shall be and remain increased or reduced, or the shares subdivided, as the case may be, to the amount in the manner and subject to the conditions set forth by such by-law.

New stock subject to provisions of this part.

4. The whole of the stock, as so increased or reduced or with such subdivided shares, shall become subject to the provisions of this Part, in like manner, as far as possible, as if every part thereof had been or formed part of the stock of the company originally subscribed. 2 E. VII., c. 15, s. 45.

Increase or reduction of capital, etc.

Increase of capital.
Reduction of capital.
Modes of reduction.
Pari passu.
Illegal reduction.

Procedure for alteration of capital stock.

Increase, decrease, or sub-division.
Further requirements in case of reduction.
Consolidation of shares.

The general rule is that where the authorized share capital of a company has become fixed by its letters patent there is no inherent power in the company or in its shareholders or directors to alter such share capital. The Act, however, contains provisions permitting such alteration on compliance with the statutory requirements.

It follows from the rule first stated that no increase, decrease or subdivision of the capital stock of a company is valid unless the steps prescribed by the statute have been strictly followed. So where the

company's capital has been increased without the issue of supplementary letters patent and the holders of the new shares have voted on a resolution at a shareholders' meeting the resolution is invalid, even though a majority of the original shareholders voted in favor of it: *Courchene* v. *Viger Park Co.* (1915) 23 D. L. R. 693; 24 Que. K. B. 97. Secs. 51-57.

Under the Dominion Act, it is a condition precedent for the increase of capital that ninety per cent. of the authorized capital has been subscribed and fifty per cent. thereon paid in. *Bona fide* compliance with this requirement is essential, and an attempt to pay up the existing shares by declaring a discount to the amount unpaid is ineffectual: *In re Ontario Express & Transportation Co.* (1894) 21 A. R. 646. See also *Page* v. *Austin* (1884) 10 S. C. R. 132, 167. The increase of capital must, moreover, be sanctioned by supplementary letters patent. While such supplementary letters patent when granted are not open to attack at the instance of a member of the public by reason of the irregularity in respect of any matter preliminary to their issuance, this rule does not apply as against the Attorney-General: *Myers* v. *Lucknow Elevator Co.* (1905) 6 O. W. R. 291. Increase of capital.

On an increase of capital the new shares should be offered to the existing shareholders pro rata, and a one-sided allotment by the directors to themselves of the new shares so as to alter the control has been held invalid: *Martin* v. *Gibson* (1908) 15 O. L. R. 623. See also *Bonisteel* v. *Collis Leather Co.* (1919) 45 O. L. R. 195.

The procedure to be followed by the company on an application for an increase of capital is set out below.

Section 54 of R. S. C. 1906, c. 79, was repealed in 1917 by the Companies Act Amendment Act, 7-8 V. c. 25, and a new group of sections numbered 54 to 54F enacted. These sections adopt the provisions of sections 46 and following sections of the Imperial Companies (Consolidation) Act, 1908, with some modifica- Reduction of capital.

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tions necessitated by reason of the different mode of incorporation in use under the Dominion Act, viz., by letters patent instead of by memorandum and articles of association, and by reason of the fact that the Secretary of State is substituted for the Court as the authority who confirms the reduction.

Modes of reduction.

A reduction of the capital stock of a company may take place in various ways, of which the following are examples:—

1. By cancelling liability of shareholders in respect of unpaid capital. For example, shares having a par value of $100 each have been subscribed for and issued to shareholders; $50 have been paid up on each share and there remains a liability of $50, which can be called up at any time by the directors. If the shares are reduced to $50 fully paid shares this liability is extinguished.

2. By paying off or returning paid-up capital not required for the purposes of the company.

3. By cancelling authorized capital or unissued shares.

4. By cancelling capital which has been lost or is unrepresented by available assets.

This latter mode is the one which is adopted for the purpose of enabling a company to pay dividends after a loss or depreciation of capital. See *In re Hoare, &c., Co., Ltd.* (1904) 2 Ch. 208, and the note to s. 70.

In view of the fact that the amendment to the Act is recent and the practice thereunder has not yet been defined it is not possible to state to what extent the decisions under the corresponding sections of the Imperial Act will be applied, but it is submitted that the Secretary of State will be guided by the English practice. The following is a short statement of the result of some of the more important cases under the sections of the Imperial Act.

Further modes of reduction.

The section authorizes the reduction of share capital in "any way"; and the above list of modes is not exhaustive. Any form of reduction of capital may

be sanctioned: *British American Trustee Corporation* v. *Couper* (1894) A. C. 399; if it is not unjust or inequitable: *In re Credit Assurance, &c., Corporation, Ltd.* (1902) 2 Ch. 601; and is fair as between the various classes of shareholders: *Poole* v. *National Bank of China* (1907) A. C. 229. A scheme of reduction may be fair and equitable though it alters the rights of preference shareholders: *In re Welsbach Incandescent Gas Light Co., Ltd.* (1904) 1 Ch. 87.

Pari passu reduction.

Where there are several classes of shares *prima facie* the reduction should be *pari passu*: *Bannatyne* v. *Direct Spanish Telegraph Co.* (1887) 34 Ch. D. 287. If, however, preference shares are entitled to priority as to capital the reduction should be effected upon the other classes: *In re Agricultural Hotel Co.* (1891) 1 Ch. 396; *In re London and New York Investment Corporation* (1895) 2 Ch. 860. The rule is that, where there are different classes of shares, the loss of capital should fall on those classes which according to the constitution of the company are the proper ones to bear it: *In re Floating Dock Co., Ltd.* (1895) 1 Ch. 691. But a reduction may be sanctioned which alters the rights of different classes of shareholders: *In re Welsbach Incandescent Gas Light Co.* (1904) 1 Ch. 87.

In that case the company having passed a special resolution for reduction of its capital also resolved in accordance with the provisions of the articles that, after confirmation of the special resolution by the Court, the rights of the shareholders *inter se* should be altered in favor of the ordinary shareholders at the expense of the preference shareholders. It was held that the Court might consider whether the scheme was fair or unfair, whether it did or did not accord exactly with the legal rights of the shareholders; and the scheme, including the alteration of the rights of the shareholders, being deemed fair and equitable the reduction was confirmed.

In *British and American Trustee Corporation* v. *Couper* (1894) A. C. 399, the company had power under its articles to reduce capital by paying off capital.

Secs. 51-57. The company carried on business in England and the United States and found this to be disadvantageous, and a special resolution was passed whereby the company was to make over the American assets to the shareholders there and cancel their shares, the English shareholders taking the English assets and an agreed sum by way of adjustment. It was held that the arrangement was fair and equitable and should be confirmed.

Illegal reduction.

For examples of cases where reduction has been refused on the ground of illegality see *In re Development Company of Central and West Africa* (1902) 1 Ch. 547; *Re Walker Steam Trawl, &c., Co.* (1908) S. C. 123 Ct. of Sess. 10 F. 123. In the former case deferred shares were proposed to be cancelled and the holders were to receive 100 £1 ordinary shares in exchange for each £1 deferred share. This scheme was held to be illegal as being in reality an increase of capital and the issue of part thereof at a 99 per cent. discount. In the latter case part paid shares were converted into paid-up shares and the unissued capital increased.

Procedure for alteration of capital stock.

Increase, decrease or subdivision.

The procedure to be followed by the company is the same for applications to increase, decrease or subdivide the share capital of the company.

A by-law must first be passed by the directors and approved by the votes of shareholders representing two-thirds in value of the subscribed stock of the company at a special general meeting of the company duly called for considering the by-law. The directors must then within six months after the approval of the by-law by the shareholders apply to the Secretary of State for supplementary letters patent. The by-law does not become operative until the supplementary letters patent confirming it have been issued.

The following documents are required:—

(1) Petition for supplementary letters patent signed by the directors or a majority of them.

(2) Declaration verifying signatures to the petition. Secs. 51-57.

(3) Declaration verifying the truth of the facts set out in the petition and the *bona fide* character of the increase, decrease or sub-division.

(4) Declaration by a responsible officer of the company proving the due passing of the by-law and producing and verifying the following:—

(a) Copy of such by-law duly certified under the seal of the company and signed by the President or Vice-President and by the Secretary;

(b) A copy of the proceedings at the meeting of shareholders with respect to the confirmation of the by-law;

(c) An extract from the general by-laws of the company setting out the provisions applicable to the calling of meetings of shareholders;

(d) A copy of the notice or advertisement as the case may be summoning the meeting of shareholders.

Further requirements in the case of reduction of capital.

In any case of reduction of share capital publication of the reasons for reduction or other information with regard thereto may be required (s. 54F). See *In re Truman, Hanbury, Buxton & Co.* (1910) 2 Ch. 498.

In all cases of reduction of capital the company is required to add the words " and reduced " to its name until such date as is fixed by the Secretary of State. Where the reduction does not involve the diminution of liability or paying off any paid-up share capital they are only required to be used from the time of the presentation of the petition; and the Secretary of State may dispense altogether with the use of the words, but under the English practice this is rarely done. It was done in *In re Australian Estates and Mortgage Co.* (1910) 1 Ch. 414 on the ground that the company would be injured by the addition.

Where a diminution of liability or a return of paid up capital are involved the words must be used from the date of the confirmation of the by-law. And in both

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cases under the English practice the use of this addition is generally required for a period of one month.

Where the proposed reduction of share capital involves a diminution of liability or a return of paid-up capital, and in any other case if the Secretary of State so directs, the Secretary of State must settle a list of the creditors of the company entitled to object to the reduction and follow the additional procedure set out in s. 54B for obtaining their consent or dispensing with it on the terms set out in the section. Doubtless under ss. 54B. ff. the practice under the corresponding sections of the Imperial Act will be largely adopted, as to which see Palmer Precedents, Part 1 (ed. 1912), p. 1287.

Consolidation of shares.

The provisions with respect to the confirmation of the by-law and the obtaining of supplementary letters patent do not apply to a by-law consolidating the existing shares of the company into shares of a larger par value.

It is to be noted that the right to consolidate shares is only given where the par value of the shares is less than $100 each, and the shares as consolidated must not exceed the par value of $100 each (s. 51). If it is desired to issue shares of a greater par value than $100 each the proper provision for that purpose should be embodied in the petition for incorporation.

Calls.

Calls within the first year.

58. Not less than ten per centum upon the allotted shares of stock of the company shall, by means of one or more calls formally made, be called in and made payable within one year from the incorporation of the company.

Calls for residue.

2. The residue shall be called in and made payable when and as the letters patent, or the provisions of this Part, or the by-laws of the company direct. 2 E. VII., c.15, s. 46.

Call when demand made.

59. A call shall be deemed to have been made at the time when the resolution of the directors authorizing such call was passed. 2 E. VII., c. 15, s. 47.

Interest on calls.

60. If a shareholder fails to pay any call due by him, on or before the day appointed for the payment thereof, he shall be

liable to pay interest for the same, at the rate of six per centum per annum from the day appointed for payment to the time of actual payment thereof. 2 E. VII., c. 15, s. 47. Sect. 60.

61. The directors may, if they think fit, receive from any shareholder willing to advance the same, beyond the sums then actually called for, all or any part of the amounts remaining unpaid on the shares held by such shareholders. Payment in advance on shares.

2. Upon the money, so paid in advance, or so much thereof, as, from time to time, exceeds the amount of the calls then made upon the shares in respect of which such advance is made, the company may pay interest at such rate not exceeding eight per centum per annum, as the shareholder who pays such sum in advance and the directors agree upon. 2 E. VII., c. 15, s. 48. Interest may be allowed.

62. If after such demand or notice as is prescribed by the letters patent, or by resolution of the directors, or by the by-laws of the company, any call made upon any share is not paid within such time as by such letters patent or by resolution of the directors or by the by-laws is limited in that behalf, the directors, in their discretion, by vote to that effect duly recorded in their minutes, may summarily declare forfeited any shares whereon such call is not paid. Forfeiture of shares for non-payment of calls

2. Such shares so declared forfeited shall thereupon become the property of the company, and may be disposed of as the company by the by-laws or otherwise prescribes. Revert to company.

3. Notwithstanding such forfeiture, the holder of such shares at the time of forfeiture shall continue liable to the creditors of the company at such time for the full amount unpaid on such shares at the time of forfeiture, less any sums which are subsequently received by the company in respect thereof. 2 E. VII., c. 15, s. 49. Liability of holders to creditors.

63. The directors may, if they see fit, instead of declaring forfeited any share or shares, enforce payment of all calls, and interest thereon, by action in any Court of competent jurisdiction. Enforcement of payment of calls by action.

2. In such action it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is a holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrear amount, in respect of one call or more, upon one share or more, stating the number of calls and the amount of each call, whereby an action has accrued to the company under this Part. 2 E. VII., c. 15, s. 50. What only need be alleged and proved.

Secs. 58-63. **Calls.**

Definition of call.
Discretion of directors.
Instalments distinguished from calls.
How made.
Procedure in making calls.
Regularity of calls.
Proof of making call.
Prepayment of shares.
Notice of call.
Enforcement of payment of calls.
Defences to action for calls.

Forfeiture.

Liability or disability apart from forfeiture.
Regularity of forfeiture.
Procedure.

Cancellation.

Surrender.

Definition of call.

The term " call " is an expression used to denote both a demand for money and the sum demanded, and in this last sense it signifies either the whole sum required to be raised at one time from the shareholders of a company by contribution amongst themselves or that proportion of this entire sum which is payable in respect of each share. See also *Re Port Arthur Wagon Co., Tudhope's Case* (1919) 45 O. L. R. 260, 268.

Discretion of directors.

Section 58 provides that not less than ten per centum on the allotted shares of the company shall be called up within a year from the date of incorporation. It appears that this section, like section 26, is directory only, and that the failure of the directors to make the prescribed calls has not the effect of putting a shareholder in arrears so as to prevent his making a transfer of his shares: *Ontario Investment Association* v. *Sippi* (1890) 20 O. R. 440. Since the Act contains no provisions as to how the balance of the allotted shares shall be called up, the time and the manner of calling up the stock depend on the provisions of the letters patent or the by-laws relating to calls. Hence, if the letters patent or by-laws contain no restrictions the

Discretion of Directors.

directors may make calls as they see fit in the exercise of their discretion, subject only to the limits which are set, first, by the rule that no calls can be made upon the shareholders of any company for any purposes not warranted by the constitution of that company; secondly, that the shareholders are not bound to contribute more than the capital which may have been agreed upon; and thirdly, where shares have been subscribed for on the basis of a prospectus or an agreement whereby they are payable by fixed instalments the directors can not increase those instalments or make the shareholder anticipate the date of payment by means of calls.

The Court will not interfere with the discretion of directors in making a call; for example, on the ground that the money is not wanted for the purposes of the company, or on any other ground except *mala fides*: *Odessa Tramways* v. *Mendel* (1878) 8 Ch. D. 235, but this holding is to be taken as subject to the exception that no call can be made in anticipation of the instalment provided for in the subscription.

The directors, in the absence of statutory restriction, can call up all the amounts unpaid in respect of shares at one time: *Lake Superior Navigation* v. *Morrison* (1872) 22 U. C. C. P. 217.

Where a call is made upon all shareholders without discrimination or impartiality the Court will not interfere to determine whether it was necessary or not. But if calls were made in such a way as to favor one set of shareholders the Court might interfere to protect them: *Christopher* v. *Noxon* (1884) 4 O. R. 672, the rule being that calls must be made on shareholders equally. Even where the articles of a company gave the power to make calls on some members and not on others it was held that this did not justify the making of a call on certain members only on the ground that they had been dilatory in paying former calls: *Galloway* v. *Halle Concerts Society* (1914-5) 31 T. L. R. 469. So where directors in making a call excluded a large amount of stock held abroad it was held in an action

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Discretion of Directors.

for a call against a shareholder in Canada that the assessment was not an equal assessment and was therefore bad. And although the directors were empowered in making an assessment to restrict it to half the stock, it was held that this would not justify excluding part of the stock altogether, but at most allowed them to make an equal assessment on all the stock to that extent: *European and N. A. Ry. Co.* v. *McLeod* (1875) 16 N. B. 3.

Even though the articles of association of a company may permit the directors to make a difference between shareholders in the amount of calls and the time of payment, it is a breach of duty on the part of directors to favor themselves in this regard unless they inform the shareholders and get their consent: *Alexander* v. *Automatic* (1899) 2 Ch. 302. . The general rule that directors must not favor themselves applies where the contribution exacted from the shareholders is not technically a call: *Peterborough Cold Storage Co.* (1907) 14 O. L. R. 475.

In an action for calls respondent alleged that the subscriptions of two shareholders had been reduced on the subscription book after the respondent subscribed for his shares, and the call having been made against these shareholders on the reduced amount was unequal and therefore invalid. Held, that while admitting the principle that calls must be equal the respondent had failed to prove that the 'calls were either illegal, partial, or unjust': *National Insurance Co.* v. *Hatton* (1879) 2 L. N. 238, 24 L. C. J. Q. B. 26.

A company which is in difficulties may make a call to prevent the transfer of shares: *Gilbert's Case* (1869-70) L. R. 5 Ch. 559, and a call may be made to increase the saleable assets of a company to the amount thereof: *New Zealand, &c., Co.* v. *Peacock* (1894) 1 Q. B. 622.

Instalments distinguished from calls.

Instalments distinguished from calls.

Instalments payable under agreement to purchase shares are not calls, *e.g.*, where there has been a public issue and shares are subscribed for on the terms of a prospectus providing for payment by instalments:

Alexander v. *Automatic* (1900) 2 Ch. 56. See also *Re Port Arthur Wagon Co., Tudhope's Case* (1919) 45 O. L. R. 260. In *Graham Island Collieries* v. *McLeod* (1914) 16 D. L. R. 281, Macdonald, C.J.A., and Martin, J.A., of the British Columbia Court of Appeal, said that a stipulation that the balance due under a subscription should be payable on call within eighteen months after allotment meant that the balance should not be payable within eighteen months except on call, but that after the expiration of such time the balance became due and payable without call. It is difficult to see, however, what answer the company could have in such a case to the defence of the shareholder that he was entitled to have the terms of his agreement adhered to.

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Instalments.

The question arises whether default in the payment of instalments as distinguished from calls will enable directors to forfeit shares. Unless the prospectus or agreement on which the shares are sold expressly enables the directors to forfeit for non-payment of instalments it is submitted there is no such power. The proper procedure is to make a formal call and then, in the event of further default, to declare a forfeiture under section 62 for non-payment of the call. Section 66 provides that no share shall be transferable until all previous calls thereon are paid; in the absence of authority it is extremely doubtful whether shares on which instalments are overdue are similarly incapable of transfer. See now *Re Port Arthur Wagon Co., supra.*

Commencement of liability.

Generally there is no liability to pay for shares until a call is made, and notice thereof given to the shareholder, and until that time the statute of limitations does not run against the company. Therefore, persons named as shareholders in a charter issued in 1880 were in in 1891 held liable to pay the amount of their shares, no formal call having been made in the meantime: *Re Haggart Bros. Manufacturing Co.; Peaker's and Runion's Case* (1892) 19 A. R. 582, and see *Alexander* v. *Automatic Telephone Co.* (1900) 2 Ch. 56.

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An agreement that a shareholder shall not be liable for calls is *ultra vires*: *Ex p. Clark* (1869) L. R. 7 Eq. 550; *Bunn's Case* (1860) 2 De G. F. and J. 275, and see *Re Lake Ontario Navigation Co.* (1909) 20 O. L. R. 191; and when a call has been made a shareholder can not be released from his liability to pay it: *Mother Lode Consolidated* v. *Hill* (1903) 19 T. L. R. 341.

If a person *sui juris* is beneficially entitled to shares and the registered holder has paid calls thereon the beneficial owner is bound to indemnify him: *Hardoon* v. *Belilios* (1901) A. C. 118. Where a call is made after the death of a shareholder his executors are liable to pay it out of his assets: *New Zealand Gold, &c., Co.* v. *Peacock* (1894) 1 Q. B. 622.

How made.

Sections 58, 59 and 80 contain the provisions of the Act relating to the making of calls. Directors are governed with respect to the exercise of their power to make calls by all such restrictions and limitations as are contained in the Act, letters patent and by-laws, s. 58 (2), and can only make calls at such times, and after such notice and for such amounts as are prescribed in the letters patent and by-laws, see *Re Pyle Works* (1890) 44 Ch. D. 534.

It is not altogether free from doubt whether it is necessary that there should be a by-law either specifically making the call itself or providing in general terms that calls should be made in some other way than by by-law, *e.g.*, by resolution of the directors. Section 58 (2) seems to imply that the passing of a by-law is necessary, and section 80, which states that the directors may pass by-laws regulating the making of calls, looks to the passing of a general by-law defining the procedure to be followed by the directors in making calls. On the other hand section 59 provides that a call shall be deemed to have been made when the resolution of the directors authorizing the call was passed, thus indicating that a call may be made by simple resolution of the directors; and in *Portland and Lancaster Steel Ferry Co.* v. *Pratt* (1850) 7 N. B. 2

Allen 17, it was held that where the charter provided that shares were to be issued in such manner as the by-laws of the company should direct and be paid in such sums and at such times as the directors should appoint, it was not essential to the company's right to sue for calls that by-laws for issuing the stock should have been made, provided that the directors who made the calls were duly appointed. Secs. 58-63. How made

In *Rascony Woollen and Cotton Manufacturing Co.* v. *Desmarais* (1886) M. L. R. 2 S. C. 381, it was held that where no by-law exists calls may be made as prescribed by the directors. See also *Union Fire Insurance Co.* v. *O'Gara* (1883) 4 O. R. 359.

The better procedure is to pass a by-law and to have it confirmed by the shareholders in the organization stage of the company. The by-law should provide that one or more calls may be made by resolution of the directors at such intervals, for such amounts and with such provisions as to notice, time of payment, etc., as the directors shall see fit.

BY-LAW PRESCRIBING MODE OF MAKING CALLS.

'The directors may by resolution from time to time make such calls as they think fit upon the shareholders in respect of all monies unpaid on the shares held by the shareholders respectively and not by the conditions of allotment thereof made payable at fixed times, and each shareholder shall pay the amount of every call so made on him to the persons and at the times and places appointed by the directors. A call may be made payable by instalments.'

Procedure in making calls.

With such a by-law as the foregoing in force a call is properly made by resolution which must be passed:

(1) By a quorum of the directors
(2) duly qualified
(3) duly elected
(4) and at a meeting regularly convened.

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The resolution should specify:

(a) The amount of the call.

(b) The date appointed for payment.

(c) The bank or other person to whom and the place where payment is to be made, and if the letters patent or by-laws do not contain any relevant provisions,

Procedure.

(d) The length of notice of call.

(e) The date after which shares are liable to forfeiture if the call is not paid, and

(f). The manner of service of notice of call, the provisions relating to which should conform to s. 97 of the Act.

The following form of resolution may be used:

RESOLUTION FOR CALLS.

'That a call of $ per share be and the same is hereby made on each of the shareholders of the company, and that such call be payable on the day of 191 , to the company at the head office, (address).'

If no time is limited by the letters patent or by-laws for payment of the call add,

'That days' notice of this call shall be given to every holder of unpaid or partly paid shares, and if the call is not paid within days of the date appointed for payment the shares in respect of which such call is not paid shall be liable to forfeiture.'

If the letters patent or the by-laws contain no provision as to demand or notice to be served on shareholders in respect of a call, add the following:

'And that the secretary of the company be and he is hereby ordered to serve on each holder of unpaid or partly paid shares a notice of the above call by sending such notice through the post in a registered letter addressed to such shareholder at his place of abode as it appears on the books of the company.'

The contents of the foregoing resolution may be considered under the following headings:

(a) Amount of call.

It is essential that the amount of the call in respect of each share should be specified. The directors have a discretion as to the amount to be called and the Court will not interfere with the discretion of the directors in that regard: *Odessa Tramways* v. *Mendel* (1878) 8 Ch. D. 235.

(b) Date appointed for payment.

The call must fix the time for payment: *Re Cawley & Co.* (1889) 42 Ch. D. 209. The time for payment should appear in the formal resolution and cannot be fixed by mere verbal direction to the secretary: *Johnson* v. *Little's Iron Agency* (1887) 5 Ch. D. 687.

(c) Place of payment.

This should be stated in the resolution: *Re Cawley & Co., supra.* It was held in *Union Fire Insurance Co.* v. *O'Gara* (1883) 4 O. R. 359, that it was insufficient if the notice alone named the place of payment, but in *Provident Life Insurance and Investment Co.* v. *Wilson* (1865) 25 U. C. R. 53, where the charter expressly provided that shares should be paid "by such instalments and at such times and places as the directors of the corporation shall appoint," it was held a fatal objection to an action for a call that the directors had appointed no place of payment.

Regularity of calls.

A call to be valid must be made at a regularly convened meeting at which a quorum of duly elected and duly qualified directors are present. If the meeting is irregularly held, *e.g.*, if absent directors have not consented to the meeting being held in their absence, even though the requisite number are present they cannot make a valid call: *Canadian Ohio* v. *Cochrane* (1915) 7 O. W. N. 698, 8 O. W. N. 242. The presence on the board of persons who are not legally qualified to act as such will not invalidate the act of the board done by a legal quorum of the properly qualified directors: *Mor-*

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den Woollen Mills v. *Haeckels* (1908) 17 Man. 557, a case decided under the Manitoba Companies Act, R. S. M. 1902, c. 30. And where the articles of a company declare that the acts of disqualified directors shall be valid, a call may be good though one of the directors necessary to make a quorum is not qualified: *Alberta Improvement Co.* v. *Peverett* (1914-15), 7 W. W. R. 757. where the English cases are collected.

Regularity of calls.

The power to make calls being discretionary cannot be delegated: *Provident Life Insurance Co.* v. *Wilson* (1865) 25 U. C. R. 53. If powers are attempted to be exercised by an insufficient board of directors such attempted exercise is invalid: *Twin City Oil* v. *Christie* (1909) 18 O. L. R. 324; see also *Garden Gully United Quartz Mining Co.* v. *McLister* (1875) 1 App. Cas. 39; *Alma Spinning Co., Bottomley's Case* (1880) 16 Ch. D. 681; *Howbeach Co.* v. *Teague* (1860) 5 H. & N. 151, *Austin's Case* (1871) 24 L. T. 932.

Where provisional directors before letters patent are granted attempt to make a call, confirmation or adoption of the resolution making the call by the directors after the issue of the letters patent is necessary in order to make the call valid: *Toronto Gas Co.* v. *Russell* (1850) 6 U. C. R. 567, and *Cazelais* v. *Picotte* (1900) Q. R. 18 S. C. 538. But in this connection regard must be had primarily to the powers conferred by the governing statute on the provisional directors.

While an irregularity in making a call renders the call invalid, if a call be made by a proper authority for proper purposes it is not every trifling irregularity that will vitiate it: *British Sugar Refining Co.* (1857) 3 K. & J. 408. The illegality of a second call does not invalidate a former call because contained in the same resolution: *Union Fire Insurance Co.* v. *O'Gara* (1883) 4 O. R. 359.

A defective call can be subsequently confirmed by a regular meeting of the directors: *Austin's Case* (1871) 24 L. T. 932.

Shareholders may waive informalities, so where they have assisted in the making of calls they can not

subsequently object that such calls were improperly made: *Christopher* v. *Noxon* (1884) 4 O. R. 672; and see as to the effect of waiver of formalities by shareholders: *Fort William Commercial Chambers* v. *Braden* (1914) 6 O. W. N. 24. Questions as to the legality or regularity of calls sometimes arise where the Act of incorporation provides that successive calls may be made only after specified intervals, or after certain notice. The following are typical examples of such provisions:

Regularity of calls.

Where the plaintiff's Act of incorporation (5 Wm. IV., c. 48) required thirty days' notice to be given of the calls for the payment of each instalment of the capital stock it was held (1) that the full time of thirty days must elapse between the times appointed for payment of the several instalments; (2) and that it was not sufficient in one notice to call for payments of several instalments at intervals of less than thirty days: *St. John Bridge Co.* v. *Woodward* (1840) 3 N. B. 1 Kerr 29, see also *National Insurance Co.* v. *Egleson* (1881) 29 Gr. 406; *Gas Co.* v. *Russell* (1850) 6 U. C. R. 567.

Where by the Act of incorporation of the company it was provided that no instalment should be "called for or become payable in less than thirty days" after notice, etc., it was held by Spragge, C.J.O., and Hagarty, C.J., that the time fixed for the payment of instalments need not be thirty days apart; but that instalments might be made payable at any time, provided thirty days intervened between the date of notice of the call and the day on which it was payable. Burton and Patterson, J.J.A., however, thought that no instalment could be lawfully made payable in less than thirty days from the date of payment of the next preceding instalment: *Provincial Insurance Co.* v. *Worts*, 31 U. C. C. P. 523; (1883) 9 A. R. 56.

Where an Act provided that "calls shall be made at intervals of thirty days and upon notice to be given thirty days at least prior to the day on which such call shall be payable," it was held that calls could not be

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legally made at one time, and that in computing the interval the time must be reckoned exclusively of the day on which the previous call was payable: *Bank of Nova Scotia* v. *Forbes* (1883) 16 N. S. 4 Russ. & Geld. 295.

Regularity of calls.

The Railway Clauses Consolidation Act (Can.), 14 and 15 Vict. c. 51, provided that no call should be made "at a less interval than two months from the previous call." It was held that calls made on the first of September, first of November, first of January were bad: *Buffalo, Brantford and Goderich Ry. Co.* v. *Parke* (1885) 12 U. C. R. 607; see also *Port Dover and Lake Huron Ry. Co.* v. *Grey* (1875) 36 U. C. R. 425. And where in similar circumstances the shareholder paid one call and then assigned his shares, he was held not liable for the other calls: *Mooré* v. *McLaren* (1862) 11 C. P. 534.

Where calls on stock were to be made "at periods of not less than three months' interval" and one call was made payable on 10th August and another on 10th November, it was held that the necessary interval had not elapsed between the two calls and that the second call was, therefore, bad: *Stadacona Fire Insurance Co.* v. *Mackenzie* (1878) 29 U. C. C. P. 10.

Effect of disorganization.

In an action against a shareholder for the amount of his unpaid shares, it was proved that the officers and directors of the company had resigned and had not been replaced. The Court made an order requiring the company to proceed to the election of new officers and of a curator according to 371 CC. and produce acts thereof before proceeding with the case: *La Compagnie d'Instruments Agricoles* v. *Hebert* (1875) 2 Q. L. R. 182. See also 31 Vict. (1868) c. 25, s. 20 Que.

An action for calls by a pretended officer on behalf of a company which had fallen into complete disorganization, and had neither president nor directors, was dismissed: *La Compagnie du Cap Gibraltar* v. *Lalonde* (1889) 5 M. L. R. S. C. 127; *Massawippi Valley Ry. Co.* v. *Walker* (1871) 3 Rev. Leg. 450.

Proof of making a call.

Where calls are made by by-law a copy of the by-law under the corporate seal and purporting to be signed by an officer of the company is *prima facie* evidence of such by-law, s. 109. If the calls are made by resolution they may be proved by entry in the directors' minute book showing the making of the call: *Ross* v. *Machar* (1885) 8 O. R. 417. It should be noted that the directors' minute book is not one of the books required to be kept by the company by s. 89 of the Act and is, therefore, not by s. 107 made *prima facie* evidence of the facts therein stated. Secs. 58-63.

Notice of call.

A proper notice must be served on each shareholder bringing to his attention the fact that a call has been made and requiring him to pay the amount due in respect of the shares held by him.

The principle on which a shareholder is entitled to notice of a call is that it is unjust for him to be treated as in default until he has received notice of the making of the call. This rule applies not only where notice is expressly required by the statute, the letters patent or the by-laws, but also where there is no express provision on the subject and the shareholder has entered into an absolute covenant to pay such calls as may be made: *Miles* v. *Bough* (1842) 3 Q. B. 845. On the other hand, if the shareholder has been notified of the call, it is immaterial as far as his liability is concerned that other shareholders have not received notice or that the notice given them is defective: *Newry and Inniskillen Ry. Co.* v. *Edmunds* (1848) 2 Ex. 118: *Shackleford* v. *Dangerfield* (1868) L. R. 3 C. P. 407.

Notice of call is, of course, ineffective unless the shares have been allotted: *Re Canadian Tin Plate Decorating Co., Morton's Case* (1906) 12 O. L. R. 594.

The terms of the notice must correspond with the directions of the letters patent, the by-laws, or the by-law or resolution making the call. Thus, when notices of calls required payment on days different from those

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provided for in the resolution of the directors, it was held that the calls were illegal, not being authorized by the resolution: *London Gas Co.* v. *Campbell* (1856) 14 U. C. R. 143. If the notice is irregular and the irregularity has not been waived the company is precluded from enforcing payment of the call against the person as to whom the notice is defective: *Miles* v. *Bough* (1842) 3 Q. B. 845. In *Paul* v. *Kobold* (1905) 2 W. L. R. 90; (1906) 3 W. L. R. 407, Harvey, J., at the trial thought that a notice of call need not set out in currency the amount demanded from the shareholder. The judgment of Harvey, J., was reversed on appeal but on grounds which did not affect the above point.

Notice of call.

The manner of service of notices on shareholders is prescribed by s. 97 of the Act, which provides that notices may be served either personally or by sending them through the post addressed to the shareholders at their places of abode as they appear on the books of the company. The phrase "books of the company" presumably refers to the books required to be kept by s. 89 of the Act in which must be recorded the names alphabetically arranged of all shareholders and their addresses as far as can be ascertained.

It has been held that a notice was properly directed when it was mailed by the secretary of a company to a female married shareholder at the address of her husband (who was a director) and which was given by him in all proceedings connected with the company, no address being registered or given on the certificate: *Jones* v. *North Vancouver Land and Improvement Co.* (1910) A. C. 317.

The question arises, whether, if the registered shareholder is dead and his executors have not procured themselves to be registered as holders, the executors are entitled to notice of calls. In *Allen* v. *Gold Reefs* (1900) 1 Ch. 656, Lindley, M.R., at p. 670, held that the company was neither bound to send a notice addressed to the deceased shareholder nor to serve his legal personal representatives with notice so long as they had not had themselves registered. In that case the articles

provided that notices were to be sent to "members." In a previous case where the articles contained no provision as to notice to deceased members, the company not having been notified of the death of the shareholder, sent a notice of call addressed to him. The notice did not reach the executors and was returned to the company marked "gone away," and it was held that under the circumstances the call had been properly made and that there had been sufficient notice thereof: *New Zealand Gold Co.* v. *Peacock* (1894) 1 Q. B. 622. See also as to rights of executors of a deceased shareholder: *Llewellyn* v. *Kasintoe Rubber Estates* (1915) 84 L. J. Ch. 70. Section 3(d) of the Act defines the term shareholder to include the personal representatives of the shareholder, so that under the Act it would appear to be necessary to notify the personal representatives of the call in the event of the death of the shareholder. And in *Glass* v. *Hope* (1869) 16 Gr. 420, where the shareholder died and the payments on his shares went into arrear the company was held to be not able to declare a forfeiture of the shares in the absence of the personal representatives though none were appointed at the date of the forfeiture and none were appointed until several years thereafter.

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Notice of call.

On the other hand s. 62 of the Act only contemplates that notice of some description should be given and does not specify to whom the notice must be sent provided that it complies with the provisions of the letters patent or the by-laws or the resolution of the directors governing the matter, so that if the letters patent, by-laws or the resolution of the directors should contain an apt provision that notice addressed to the place of abode of the shareholder as it appears on the books of the company, there seems no reason why *New Zealand* v. *Peacock* should not apply. It is, accordingly, important that this by-law should contain a provision to the following effect:

'Any notice or document delivered or sent by post or left at the registered address of any shareholder

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shall, notwithstanding such shareholder be then deceased, and whether or not the company have notice of his decease, be deemed to have been duly served in respect of the shares, whether held solely or jointly with other persons by such shareholder until some other person be registered in his stead as the holder or joint holder thereof, and such service shall for all purposes be deemed a sufficient service of such notice or document on his heirs, executors or administrators and on all persons, if any, jointly interested with him in such shares.'

Notice of call.

A *cestui que trust* is not entitled to notice of calls: *Armstrong* v. *Merchants Mantle* (1901) 32 O. R. 387.

At the time when the notices are sent out the mailing clerk should make a statutory declaration that the notices have been posted, and the declaration should be kept among the records of the company. As to what the declaration should set out, see s. 108 of the Act

Where the letters patent provide that notices may be published in a newspaper a similar declaration of publication should be made by the secretary and a copy of the notice annexed to the declaration as an exhibit. In *Buffalo, Brantford and Goderich Ry.* v. *Parke* (1855) 12 U. C. R. 607, it was sought to prove a call on March 15th by the production of a Gazette of May 28th. This was held insufficient as the paper could not be taken as evidence of any notice prior to its date.

The date of the call itself is the date of the resolution of the directors authorizing it and not the date of the notice, s. 59; and see *Re Londonderry Ry. Co.* (1849) 13 Q. B. 998; *Shaw* v. *Lawley* (1847) 16 M. & W. 810; *Great North of England Ry.* v. *Biddulph* (1840) 7 M. & W. 243. But see *Gas Co.* v. *Russell* (1850) 6 U. C. R. 567.

Section 98 of the Act provides that a notice served by post shall be deemed to have been served at the time when the registered letter containing it would be delivered in the ordinary course of post. Proof of the time requisite for the delivery of the letter containing the notice is made by s. 108 sufficient evidence of the

time of service. In *Union Fire Insurance Co.* v. *Fitzsimmons* (1882) 4 O. R. 359, notice of call was held to have been duly given at the time of mailing the notice, but there was no section in that case corresponding to s. 98 of the Act. See *contra, Ross* v. *Machar* (1885) 8 O. R. 417, the view of O'Connor, J.A., which must be taken to be the law under the Act.

Prepayment of shares.

Directors are not bound to permit shareholders to pay up shares in advance of calls: *Re Atlas Loan, ex p. Green* (1903) 30 C. L. T. 366. Under s. 61, however, the directors may accept payment in advance of calls and this is a valuable power and one which is frequently exercised: *Lock* v. *Trotman* (1896) A. C. 461. It is in the nature of a trust and accordingly directors should only receive money in advance of calls when it can be advantageously used for the purposes of the company. The rate of interest should not be excessive and in any event not exceed 8 per cent. per annum. See *Poole, Jackson and Whyte's Case* (1878) 9 Ch. D. 322; *Re Pyle Works* (1890) 44 Ch. D. 534. It has been held that money paid in advance can not be regarded as a loan to the company and can not be repaid to the shareholders by the company: *London and Northern Steamship Co.* v. *Farmer* (1914) 58 S. J. 594, Joyce, J. As to the rights of a shareholder making such advances in the event of a winding up see *Wakefield & Co.* (1892) 3 Ch. D. 165.

Enforcement of payment of calls.

If a call is not paid the directors can enforce the liability of the shareholder thereunder by action, s. 63. As to what the statement of claim must set out see s. 63 (2). Until the call is paid the shareholder can not transfer his shares, s. 66, and the directors are authorized by s. 71 of the Act to deduct from the dividends payable to any shareholder any amounts which may be due on account of calls.

Finally, the directors may threaten to forfeit the shares, which proceeding is dealt with below under the heading "forfeiture."

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Various defences may be raised to an action for payment of calls. The more important are the following:

Defences to action for calls.

1. Payment.

A company may take a promissory note from a shareholder for the amount of a call in the absence of a prohibition in the statute applicable to the company: *St. Stephen Branch Ry.* v. *Black* (1870) 13 N. B. 139, but the effect of giving a note is merely to extend the time for payment. Accordingly where a note was taken in payment of a call, and the note was not paid at maturity, it was held that the debt revived: *Freeman* v. *Canadian Guardian* (1908) 17 O. L. R. 296. If a company accepts valuable consideration, *e. g.* debentures in payment of calls, it cannot afterwards bring action for the call, at least without offering to return the consideration: *Ross* v. *Angus* (1883) 6 L. N. 292.

Where shares have been illegally issued at a discount the holder is not thereby relieved from liability for calls for the whole unpaid balance of their par value: *North West Electric* v. *Walsh* (1898) 29 S. C. R. 33.

2. Denial that the defendant ever became a shareholder.

It is only shareholders who are liable for calls: *Twin City Oil* v. *Christie* (1909) 18 O. L. R. 324. If the person named as shareholder on the books of the company holds the shares as trustee for any person named in the books of the company as being so represented by him he will not be personally liable, nor is there any personal liability where the shares are held as collateral security; see s. 41.

A person may by his conduct disentitle himself from denying that he is a shareholder, *e.g.* if he has already paid one call: *Morden Woollen Mills* v. *Heckels* (1908) 17 Man. R. 557 and see the notes to s. 46.

3. Transfer of the shares before the call was made. Secs. 58-63.

That the shareholder has validly transferred his shares before the call is a good defence to an action by the company in respect of the call. The transfer must have been registered in the books of the company. See generally on transfers the notes to s. 64.

A transfer of his shares after the call on the other hand leaves the shareholder liable to pay the amount of the call: *Montreal Mining Co.* v. *Cuthbertson* (1852) 9 U. C. Q. B. 78, and see s. 66 which provides that no share shall be transferable until all previous calls thereon are paid. The provisions of the section are imperative and cannot be waived: *Smith* v. *Gowganda* (1911) 44 S. C. R. 621; doubted in *Port Arthur Wagon Co., Sheldon's Case* (1919) 45 O. L. R. 260. In *Peterborough Cold Storage Co.* (1907) 14 O. L. R. 475, a transfer of shares was held to be invalid although no call on the shares had technically been made. In this case the directors had made no calls but had exacted from all shareholders other than themselves a payment of 25 per cent. on subscription and 25 per cent. on allotment. The directors had transferred the stock to persons of no substance who gave their promissory note to the company for the first 25 per cent., the object being to get rid of the liability of the directors for the amount. It was held that the transaction was within the mischief of R. S. O. (1897) c. 191 s. 30 corresponding to s. 66 of the act.

Defences to action for calls.

4. A denial of the making of the call in point of fact.

5. A denial that the call admitted to have been made in point of fact was authorized or was made by competent persons or in the proper manner, as to all of which see preceding notes.

6. A denial of any notice of call or receipt of such notice as the defendant was entitled to.

Other defences which may be set up are infancy and fraud. As to the latter defence see the notes to s. 43. An infant shareholder can repudiate the shares within a reasonable time of attaining majority, after

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which date affirmation or laches and acquiescence will leave the shareholder liable: *Sovereign Bank of Canada, Clark's Case* (1916) 35 O. L. R. 448; 27 D. L. R. 253.

Forfeiture.

If the shareholder fails to pay a call on the day appointed for payment, in addition to being liable to pay interest on the amount of the call at six per cent. (s. 60) he is liable to have his shares forfeited.

The result of a forfeiture properly carried out is to extinguish all the rights and liabilities (subject to s. 62, sub-sec. 3) of the shareholder: *Randt* v. *Wainwright* (1901) 1 Ch. 184. A person whose shares have been validly forfeited ceases to be a shareholder, and is not liable to be placed on the list of contributories on a winding-up: *Re Acadia* (1918) 3 W. W. R. 477.

Power to forfeit.

The power to forfeit is not inherent in a company. It only exists where it is given by the statute under which the company is incorporated, and it is of no avail that a majority of the shareholders vote in favor of it: *Barton's Case* (1859) 4 Drew. 535: *Clark* v. *Hart* (1858) 6 H. L. C. 633.

The power to declare shares forfeited is a trust which will be narrowly scanned by the court: *Blisset* v. *Daniel* (1853) 10 Hare 483. A company cannot arbitrarily appropriate a shareholder's shares: *Acer* v. *Percy* (1903) 5 Que. P. R. 401. The nature of the right to forfeit shares and the duty of the directors in exercising the right are explained by Lord Cranworth in *Spackman* v. *Evans* (1868) L. R. 3 H. L. 171 at p. 86, as follows:—

"The power to declare shares forfeited was intended only to give the directors additional means of compelling payment of calls, or other money due from the shareholder to the company by virtue of the deed. The shares are in substance made a security to the company for the money from time to time becoming due from the shareholder. The duty of the directors when a call is made is to compel shareholder to pay to the company the amount due from him in respect of

that call; and they are guilty of a breach of their duty to the company if they do not take all reasonable means of enforcing payment. In the present case it has never been suggested that the Appellant was insolvent, that he was not perfectly able to pay the full 30s. per share, which was the amount of his call; and it was a plain breach of trust in the directors to take, in discharge of the money due from the Appellant, shares over which they had power as security only for the money due, but which shares they knew to be valueless. They were bound as trustees for the body of the shareholders, to enforce the payment of the whole 30s. per share, and for that purpose to take all proper legal proceedings, unless they *bona fide* believed that he was not in circumstances which would enable him to pay the sum for which he was sued . . ."

Forfeiture must be for the benefit of the company, not for the benefit of a shareholder: *Common* v *McArthur* (1898) 29 S. C. R. 239; and though a forfeiture is presumed to be regular, *Webster's Case*, (1863) 32 L. J. Ch. 135, yet if it be shewn to be collusive or made for the benefit of the shareholder it is inoperative: *Richmond's Case* (1858) 4 K. & J. 305.

The forfeiture of shares is not a species of forfeiture against which equity will relieve in the absence of fraud, accident or mistake: *Sparks* v. *Liverpool Waterworks Co.* (1807) 13 Ves. 428.

If calls are unpaid and the company is proceeding to forfeit the shares, but the shareholder has brought an action for rescission of his subscription the forfeiture will be restrained until the trial of the action on payment into court of the amount of the call and interest: *Jones* v. *Pacaya Rubber* (1911) 1 K. B. 455. Buckley, L.J., at p. 459 of the report guarded himself against saying that a different order would be made if the shareholder had not been willing to pay the money into court. Where a call has been made and a note is given by the shareholder the result is merely to give time, and if the note is not paid the shares can

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be forfeited: *Freeman* v. *Canadian Guardian* (1908) 17 O. L. R. 296.

Forfeiture.

After forfeiture has once taken place the remedy against the company is not in damages but a declaration that the forfeiture is a nullity, *ibid.*, per Riddell, J.

Though it is an inflexible rule that apart from express power a company cannot purchase its own shares: *Trevor* v. *Whitworth* (1887) 12 App. Cas. 409, it may by a *bona fide* forfeiture become owner of them. In such a case the shares do not necessarily become merged or extinguished but may be sold or reissued: *Commonwealth* v. *Boston R. Co.* 142 Mass. 146. As to the status of forfeited shares see Law Quarterly Review, 1914, p. 339. Where shares have been forfeited and are resold by the company discharged from all calls prior to the date of the certificate of proprietorship delivered to the new shareholder, the latter is still liable for future calls, even the certificate goes on to say that the balance due on the shares has been called up and is payable by the prior owners of the shares: *New Balkis Eesterling* v. *Randt* (1904) A. C. 65. The company may on reselling shares, which have been partly paid up before forfeiture, give credit for payments made by the prior holder: *Morrison* v. *Trustees, &c.* (1899) 68 L. J. Ch. 11. To do this is not an infraction of the rule against issuing shares at a discount, *ibid.;* but *quaere* whether forfeited shares on which nothing had been paid could be disposed of at less than their par value, or whether forfeited shares could be resold for a less sum than their par value less calls already received by the company. See *Randt Gold Mining Co.* v. *Wainwright* (1901) 1 Ch. 184, at pp. 187 and 188.

If the forfeited shares are cancelled or not reissued there is a consequent reduction of the capital stock, but the express provision of the act giving the directors power to dispose of shares forfeited as they see fit, by by-law or otherwise, no doubt overrides the general provisions prohibiting the reduction of the capital stock without a two-thirds vote in value of the

shareholders at a general meeting of the company and confirmation by supplementary letters patent.

A company having the power of forfeiture declared forfeited a number of its £10 shares on which calls varying from £3 to £7 had been paid. In the course of the proceedings for the reduction of the capital of the company, the directors proposed to change the forfeited £10 shares into £5 5s. shares, credited with £2 5s. as paid thereon, and to offer these to the holders of the ordinary shares at the price of 30s. per each reduced forfeited share. It was held that the company was not bound to treat the forfeited shares as if nothing had been paid thereon and that this was not in effect an issue of shares at a discount and that the article empowering the company to sell its forfeited shares was valid, and authorized the directors to deal with them in the way they proposed to do: *Morrison* v. *Trustees, &c. Cor.* (1899) 68 L. J. Ch. 11.

A company can on the other hand if it so desires treat forfeited shares as unissued and as if nothing had been paid thereon, although in fact certain amounts had been paid by the prior holders in respect of the shares: *Re Victoria (Malaya) Rubber Estates Lim.* (1914) 58 S. J. 706, decision of Astbury, J.

Liability or disability imposed on the shareholder apart from forfeiture.

It is to be noted that s. 62 (3) makes the former holder of forfeited shares liable to the *creditors* of the company at such time for the full amount unpaid on the shares at the time of forfeiture less any sums which are afterwards received, and in this respect the section differs in its wording from the Imperial Companies (Consolidation) Act, 1908, Table A. s. 28, which makes the person whose shares have been forfeited liable to the *company* for arrears of calls.

Forfeiture of shares involves cesser of membership in the company: *Aaron's Reef's* v. *Twiss* (1896) A. C. 273, and forfeiture prevents the company from suing for past calls since such a proceeding can only be taken against a person who is a shareholder: *Stocken's*

Secs. 58-63.

Liability or disability of shareholders.

Case (1868) 3 Ch. 415. The liability of the former shareholder for the amount of calls previous to the forfeiture of his shares under the Imperial Act is a liability as a debtor under the articles to pay calls and not as a shareholder: *In re Rand Gold Mining Co.* (1904) 2 Ch. 468. Accordingly under the Dominion Act the holder of shares in arrear as to calls is only liable to the company if the directors continue to regard him as a shareholder and sue him as such which they are authorized to do as an alternative to forfeiture by s. 63 of the act.

In the absence of contrary provisions in the letters patent or by-laws, a shareholder is not entitled to vote at meetings unless he has paid all the calls payable on all the shares held by him, s. 88 (b). In *Colonial Assurance Co.* v. *Smith* (1912) 4 D. L. R. 814 it was held that where a shareholder had given a note in payment of a call and the note was overdue he could not under the provisions of s. 12 c. 53 of 52 Vict. (Manitoba) vote at an election of directors. The fact that he had been permitted to vote at previous meetings was immaterial; and the tender at the meeting of a cheque for the arrears did not remove the disqualification. Another shareholder whose note was still current was held entitled to vote.

Shares on which calls are unpaid cannot be transferred, s. 66 and see the notes to that section.

In an action for calls a defendant cannot avail himself of a provision in the act of incorporation that by non-payment the shares should become forfeited where nothing had been done under it: *Ontario Marine Insurance Co.* v. *Ireland* (1855) 5 U. C. C. P. 135: *Marmora Foundry* v. *Jackson* (1842) 9 U. C. R. 509. Nor is the existence in the company of such a right a valid defence on the part of the shareholder against creditors of the company: *Harris* v. *The Dry Dock Co.* (1859) 7 Gr. 450.

Regularity of forfeiture.

When forfeiture is made the calls must have been regular and legal. They must have been made by the

proper officers of the company. The discretion to make calls can not be delegated to a committee of the directors: *York &c. Ry. Co.* v. *Ritchie*, 40 Me. 425, *Watson* v. *Eales* (1856) 23 Beav. 294 and see cases under ss. 58-60 *supra* at p. 284. Secs. 58-63.

An irregularity in the exercise of the right of forfeiture, *e.g.*, the irregular calling of the meeting of directors at which the resolution to forfeit is passed can not be cured by the shareholders confirming the action of the directors. It is the directors who are entitled to make calls and forfeit shares and the shareholders can not ratify something which is entirely within the powers of the directors: *Paul* v. *Kobold* (1905) 2 W. L. R. 90; (1906) 3 W. L. R. 407. Irregularity of forfeiture.

A slight irregularity is as fatal as the greatest: *Garden Mining Co* v. *McLister* (1875) 1 App. Cas. 39: *Johnson* v. *Lyttle's Iron Agency* (1877) 5 Ch. D. 687.

Thus where the board of directors is not legally appointed a resolution by them to forfeit stock is invalid. On May 31, 1880, the directors of a company passed a by-law reducing the number of the directorate from five to three, and this was confirmed at an adjourned general meeting of the shareholders on June 1, 1880, and a new board of three forthwith appointed, but, it appeared no notice had been given either before the original, or the adjourned meeting, of the intention of making any such change in the directorate. It was held that the appointment of the board was not legal and a resolution by it to forfeit shares for non-payment of calls was invalid; also that the company was properly made a party to an action to restrain such forfeiture, the reduction of the directorate to a board of three being its act: *Christopher* v. *Noxon* (1884) 4 O. R. 672; and see *Brady* v. *Stewart* (1887) 15 S. C. R. 82.

But where a company had power to confiscate and sell shares on which calls were not paid within a time fixed by notice, it was held that the sale was not invalid because the shares were not mentioned in detail nor the amount paid on each set out in such

Secs. 58-63.

notice: *Gilman* v. *Royal Canadian Insurance Co.* (1884) 7 L. N. 60; 1 M. L. R. S. C. 1.

Regularity of forfeiture.

It was held in *Nellis* v. *Second Mutual Building Society of Ottawa* (1881) 29 Gr. 399 that notice need not be given where it is dispensed with by the by-laws, but it is submitted, in view of the provisions of s. 62 of the Act, that the by-laws of the company or the resolution of its board of directors can not dispense with notice though the giving of such notice may be regulated.

If the act, charter, or by-laws do not authorize directors to forfeit the shares of a member for a given cause or in a given manner, then a forfeiture for such cause or in such manner will be set aside as *ultra vires,* and the shareholder may be put on the list of contributories in a winding-up: *Dixon's Case* (1869) L. R. 5 Ch. 79.

It has been held in Alberta that neither the liquidators of a company in a winding-up nor the creditors have the right to take advantage of any irregularities in proceedings taken for forfeiture of shares: *In Re Wade Co.* (1908-9) 2 Alta L. R. 117. The company itself if it has treated the shares as forfeited can not thereafter take advantage of irregularities and claim to hold the shareholder liable as such: *Webster's Case* (1863) 32 L. J. Ch. 135.

It is essential that the provisions of s. 62 be rigidly adhered to. Thus if the time within which the shareholder must pay the call is not limited by the letters patent, by-laws, or resolution of the directors as prescribed by the section, but is fixed by the notice merely, an attempted forfeiture will be ineffective: *Armstrong* v. *Merchants Mantle Mfg. Co. Ltd.* (1901) 32 O. R. 387 at p. 391.

As to notice of forfeiture see further *Robertson* v. *Hochelaga Bank* (1881) 4 L. N. 315 S. C.; *Provincial Insurance* v. *Cameron* (1880) 13 C. P. 523; *Gilman* v. *Robertson* (1884) 7 L. N. 353, and 1 M. L. R. S. C. 5.

In *Fox* v. *Selkirk Land and Investment Co.* (1912) 8 D. L. R. 945, it was held that notice of intended

forfeiture was necessary even though a by-law of the company purported to give the directors power summarily to forfeit shares on which calls were six months in arrear. In the case of an improper forfeiture the shareholder may not only bring an action for damages but he may also claim the stock itself and reinstatement as a shareholder, *ibid.* But see *Freeman* v. *Canadian Guardian* (1908) 17 O. L. R. 296. Secs. 58-63. Regularity of forfeiture.

While the shareholder alone is the person entitled to receive notice of call and of subsequent proceedings and a *cestui que trust* cannot call on the company to account to him for shares purported to have been forfeited without notice to him: *Armstrong* v. *Merchants Mantle* (1901) 32 O. R. 387, it has been held that in the case of a deceased shareholder a forfeiture of his shares could not take place in the absence of his personal representatives although none such be appointed for many years: *Glass* v. *Hope* (1869) 16 Gr. 420.

A forfeiture may be revoked by the company if it agrees subsequently to receive payment of the call in arrear, but only if the shareholder whose shares have been forfeited consents thereto: *Exchange Trust* (1903) 1 Ch. 711. Revocation.

Procedure.

If a call is not paid and it is desired by the directors to forfeit the shares of the delinquent shareholder the directors should pass a resolution authorizing the serving of a demand or notice requiring the call to be paid at a certain date and stating that if payment is not then made the shares will be liable to forfeiture. The resolution may be in the following form:—

'That notice be given by prepaid registered letter to the following shareholders who have made default in payment of the call made on day of 19 , that if such call is not paid on the day of 19 , by such shareholders respectively the shares in respect of which the call remains unpaid shall be liable to forfeiture.

Secs. 58-63. Shareholder Number of shares Denoting numbers.'

Procedure. The secretary should thereupon send to the shareholders in default, a notice which may be in the following form:—

NOTICE OF INTENDED FORFEITURE.

'Sir,

In my letter of the day of , I gave you notice that at a meeting, etc. (give particulars of call).

I am now instructed to inform you that the directors require you on or before the day of to pay the said sum of $ together with interest thereon at the rate of six per cent. per annum from the said day of (the date when such call was payable) up to the date of payment, and that in the event of non-payment of the said call and interest on or before the said day of at the place aforesaid the shares in respect of which such call was made will be liable to be forfeited.

I am &c.

....., Secretary.

To &c.'

If demand for payment and notice of forfeiture be not complied with the directors may then proceed to pass a resolution declaring forfeited the shares in default. The resolution may be in the following form:—

RESOLUTION FOR FORFEITURE.

'That the holder of shares of $ each, numbered to inclusive, having failed to pay the call of $ per share made on the said shares on the day of 19 , and due on the day of 19 , and having failed to comply with the notice served upon him dated the day of 19 , the said shares be and the same are hereby forfeited.'

The secretary should communicate to the shareholder the fact that the shares in question were duly forfeited by resolution of the directors on such and such a date.

Cancellation.

By cancellation of shares may be meant the cancellation of unissued share capital or lost capital which can only be effected under the provisions of s.s. 54 by means of a by-law for the reduction of capital confirmed by supplementary letters patent. The term cancellation, however, is more commonly used as referring to the cancellation of the subscription for shares. After shares have been allotted, if no dispute exists as to the liability of the shareholders, there is no power to cancel a subscription, unless such power is created by express words and, apparently, it will not be raised by implication: *Richmond's Case* (1858) 4 K. & J. 305; *Wheeler* v. *Wilson* (1884) 6 O. R. 421; *Kinney* v. *Plunkett* (1894) 26 N. S. R. 158. And it has been held in Ontario that the provisions of s. 18 of R. S. O. (1897) c. 191 corresponding to s. 54 of the Act, which provides a mode for the reduction of capital, impliedly excluded such power of cancellation: *Livingstone* v. *Temperance Colonization Society* (1890) 17 A. R. 379; and see *McGill Chair Company, Munro's Case* (1912) 26 O. L. R. 254, where the authorities are collected. Secs. 58-63.

The power to cancel will be construed strictly *Stanhope's Case* (1850) 3 De G. & S. 198; *Re Patent Paper Mfg. Co., Addison's Case* (1870) L. R. 5 Ch. 294.

For a case where an agreement between the company and the shareholder for the cancellation of a portion of the latter's shares was unsuccessfully set up against the liquidator, see *Fuches* v. *Hamilton Tribune* (1885) 10 O. R. 497.

If a shareholder disputes his liability and is in a position to repudiate his subscription for fraud or misrepresentation the allotment of his shares to him may be cancelled. Thus where the defendant subscribed for shares on the faith of a statement of affairs prepared by the secretary of the company, and on finding that the statement was false procured cancellation of his stock at a shareholders' meeting it was held in

Secs. 58-63. Cancellation.

an action by a creditor of the company who had become such before the cancellation that there was power to cancel the stock, and that the power was duly exercised: *Wheeler* v. *Wilson* (1884) 6 O. R. 421.

A trading corporation has power to compromise all claims against it including claims for cancellation of shares for fraud or misrepresentation but cannot compromise a claim for damages not connected in any way with the validity of shares by a cancellation of them: *Livingston* v. *Temperance Colonization Society* (1890) 17 A. R. 379.

As to power to compromise with shareholders see also *Copp's Case* (1885) 10 O. R. 497.

If shares have been agreed to be illegally issued and the matter is still *in fieri* the subscription agreement may be cancelled, but after the shares have actually been allotted and issued there can be no cancellation: *Re Matthew Guy Carriage & Automobile, Thomas's Case* (1911-12) 3 O. W. N. 902; 1 D. L. R. 642. In this case there had been a subscription for shares to be issued at a discount. Before the stock had been allotted or any notice of allotment given, or corporate action taken with respect to the subscription, a resolution was passed that all applications relating to the bonus stock should be cancelled and that any certificates issued in respect thereof should be recalled. Certificates for the shares had been issued, but Middleton, J., held that the return of the subscriptions pursuant to the above resolution and the substitution of new subscriptions thereafter was *intra vires* and binding upon the liquidator, who sought to make the defendant a contributory in respect of amounts on these shares. *In re McGill Chair Company, Munro's Case* (1912) 26 O. L. R. 254 at p. 262, Meredith, C. J. in referring to the foregoing case said that he found on enquiry from Middleton, J., that the latter had decided *Re Matthew Guy* on the basis that the contract to take the shares was still executory at the time the resolution to cancel the bonus shares was passed. If the matter no longer remains *in fieri* and shares have

been issued, *e.g.*, at a discount, and the shares have been allotted, the certificate issued, and the subscriber has acted as a shareholder, then, even though the shares were illegally issued at a discount, it is too late to cancel the certificate of shares actually issued and the shareholder will be liable in a winding up as a contributory in respect of the shares: *McGill Chair Co. Munro's Case, supra.* In that case the shareholders passed a resolution that all stock certificates which have been regarded in the light of bonus stock be recalled into the company. This had been done in response to pressure on the part of shareholders holding such stock, and the defendant had been present at the meeting of shareholders and had voted in favor of the resolution. In pursuance of the resolution a new certificate had been issued to the defendant for the amount of shares which he had paid up in full. Meredith, C. J., in his judgment reviewed the English authorities and held that cancellation or surrender of shares under the Ontario Companies Act could only take place where forfeiture would be permissible. Secs. 58-63.

Surrender.

A shareholder can be got rid of by proceeding against him *in invitum* by way of forfeiture, but he cannot without statutory authority voluntarily surrender his shares and thus put an end to his liability: *Common* v. *McArthur* (1898) 29 S. C. R. p. 245; *Winnipeg Hedge & Wire Fence Co.* (1912) 22 Man. L. R. 83. If the company desires to regain control of the stock forfeiture is the proper procedure: *Smith* v. *Gowganda* (1911) 44 S. C. R. 621. The objection to the surrender of shares, whether fully paid or not, is that this is a reduction of the company's capital: *Bellerby* v. *Rowland* (1902) 2 Ch. 14 at p. 32, and a reduction of capital requires confirmation by supplementary letters patent under ss. 55 and 57. It is immaterial that the company was solvent at the time: *Re Wallbridge Grain Co. (Alta.)* (1918) 2 W. W. R. 886.

Secs. 58-63.

The power may, of course, be expressly given by statute, as to which see *Hart* v. *Ontario Express and Transportation Co.; Kirk and Marling's Case* (1893) 24 O. R. 340; *In re Ontario Express and Transportation Co.* (1893) 24 O. R. 216 and (1894) 21 A. R. 646.

Surrender of shares.

Nor can a shareholder surrender his shares to a trustee for, or a nominee of, the company: *Cree* v. *Somervail* (1879) 4 App. Cas. 648; *Re Union Fire Insurance Company, McCord's Case* (1892) 21 O. R. 264. In the last mentioned case the manager of a company purchased a number of partly paid shares from the holder for the purpose of cancellation. The shareholder was not aware of the object intended. The transfer was made to the "Manager in Trust." It was held by Boyd, C., that the transfer having been made without notice of the character in which the manager was to hold the shares it was a valid transfer which relieved the first holder of the shares from his liability thereon. Boyd, C., said at page 266, "No valid distinction can be drawn between the cases when the object of the transfer is to traffic in shares on the part of the company and when the intention is simply to cancel. In either case (no special power so to do being given to the particular company) the transfer is illegal, but liability upon the shares is transferred, or not, depending on the knowledge or ignorance of the prior holder." There is no objection, on the other hand, to one shareholder, whether he is a director or not, with his own money buying the shares of another and so getting rid of an objectionable shareholder, per Macnaghten, L.J., in *Trevor* v. *Whitworth* (1888) 12 App. Cas. at p. 409.

Where, however, there is a power to forfeit which has become exercisable, the shares as to which there is default may be surrendered in lieu of forfeiting them in a formal manner: *Bellerby* v. *Rowland* (1902) 2 Ch. 14 at p. 31.

Also, when there is a *bona fide* dispute between the shareholder and the company as to whether the shares have been legally issued, shares may be taken back by

way of compromise, but not where the shareholder on the register admits that he is shareholder: *Mother Lode Consolidated* v. *Hill* (1903) 19 T. L. R. 341. Nor can the company take back some of the shares and leave the shareholder with the balance, *ibid.* But as to this, *quære.*

The question of the legality of surrender and cancellation is fully dealt with in the recent case of *Alberta Rolling Mills* v. *Christie* (1919) 58 S. C. R. 208. The plaintiff subscribed for shares subject to a condition that the Company would erect a steel plant. It was held that the plaintiff had accepted the status of a shareholder so that the condition could only operate as a collateral agreement entitling him to surrender his shares and demand the return of the money paid for them. Anglin, J., delivering the judgment of the majority of the Court on the question of surrender or cancellation of shares said at pages 218, 219 and 220 of the report:—

"Is such an agreement *intra vires* of the defendant company? I think not.

In *Guinness* v. *Land Corporation of Ireland* (22 Ch. D. 349, at page 375) Lord Justice Cotton, after referring to section 38 of the English "Companies Act" of 1862, corresponding to section 47 of the Consolidated Ordinance of 1915, said:—

'From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion it also follows that what is described in the memorandum as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid.'

This passage is quoted with approval in *Trevor* v. *Whitworth* (12 App. Cas. 409) by Lord Herschell, at p. 419, and by Lord Macnaghten, at p. 433. The defendant company in accepting a surrender of the plaintiff's shares could have only one of two purposes, either to extinguish them—an unlawful reduction of

Secs. 58-63. capital, or to re-issue them—an unlawful trafficking in its shares, an illegal use of its capital.

Surrender of shares.

The law on these points as laid down in *Trevor* v. *Whitworth* (12 App. Cas. 409) has been consistently followed ever since. The Companies Ordinance contains very strict provisions as to the conditions on which and the methods by which the capital of a company subject to it may be reduced—sections 78 *et seq.* There is, of course, no pretence of compliance with these provisions. As put by Lord Macnaghten in a passage of his speech in *Trevor* v. *Whitworth* (12 App. Cas. 409), at page 437, quoted by Lord Herschell in *British and American Trustee and Finance Corporation* v. *Couper* ([1894] A. C. 399, at page 403) :—

'When parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed.'

In Bellerby v. *Rowland & Marwood's Steamship Co.* ([1902] 2 Ch. 14), it was held that:—

A surrender of shares in a limited company, the company releasing the shareholders from further liability in respect of the shares, is equivalent to a purchase of shares by the company and is therefore illegal and null and void on the principle of *Trevor* v. *Whitworth* (12 App. Cas. 409).

The court was there dealing with shares partly unpaid. The surrender of fully paid-up shares with a return of the money paid therefor, is, of course, equally obnoxious. Both alike involve reduction of capital. While a surrender of shares which involves no reduction of capital may be supported (*Rowell* v. *Jno. Rowell & Sons, Ltd.* ([1912] 2 Ch. 609), a surrender involving such a reduction, not made under circumstances which would have justified a forfeiture, clearly cannot be unless effected under sections 78 *et seq.* of the Consolidated Ordinance. How strictly the right of forfeiture, and of surrender to take its place, is viewed is illustrated in the recent case of *Hopkinson* v. *Mortimer, Harley & Co. Ltd.* ([1917] 1 Ch. 646, at page 653).''

Transfer of Shares.

Sect. 64.

Invalid without entry.

64. Except for the purpose of exhibiting the rights of parties to any transfer of shares towards each other and of rendering any transferee jointly and severally liable with the transferrer to the company and its creditors, no transfer of shares unless made by sale under execution or under the decree, order or judgment of a court of competent jurisdiction, shall be valid for any purpose whatever until entry of such transfer is duly made in the register of transfers: Provided that, as to the stock of any company listed and dealt with on any recognized stock exchange by means of script, commonly in use endorsed in blank and transferable by delivery, such endorsation and delivery shall, excepting for the purpose of voting at meetings of the company, constitute a valid transfer. 2 E. VII., c. 15, s. 51.

Exception.

Unpaid shares.

65. No transfer of shares whereof the whole amount has not been paid in shall be made without the consent of the directors. 2 E. VII., c. 15, s. 52.

With calls unpaid.

66. No share shall be transferable until all previous calls thereon are fully paid in. 2 E. VII., c. 15, s. 54.

Registration of transfer.

67. The directors may decline to register any transfer of shares belonging to any shareholder who is indebted to the company. 2 E. VII., c. 15, s. 55.

Transfer by personal representative.

68. Any transfer of the shares or other interest of a deceased shareholder, made by his personal representative, shall, notwithstanding such personal representative is not himself a shareholder, be of the same validity as if he had been a shareholder at the time of his execution of the instrument of transfer. 2 E. VII., c. 15, s. 56.

Issue and effect of share warrants.

68A. A company, if so authorized by its letters patent or supplementary letters patent and subject to the provisions thereof may, with respect to any fully paid-up shares, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the share or shares therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the share or shares included in the warrant hereafter termed a share warrant.

Rights of bearer.

2. A share warrant shall entitle the bearer thereof to the shares therein specified, and the shares may be transferred by delivery of the warrant.

Bearer to be shareholder on surrender of warrant.

3. The bearer of a share warrant shall, subject to the provisions and regulations respecting share warrants contained in the letters patent or supplementary letters patent, be entitled, on surrendering it for cancellation, to have his name entered on the books of the company as the holder of the shares specified

Sect. 68A.

in such share warrant, and the company shall be responsible for any loss incurred by any person by reason of the company entering on the books of the company the name of the bearer of a share warrant in respect of the shares therein specified without the warrant being surrendered and cancelled.

Rights of bearer under regulations.

4. The bearer of a share warrant may, if the provisions and regulations respecting share warrants so provide, be deemed to be a shareholder of the company either to the full extent or for any purposes defined by such regulations; except that he shall not be qualified in respect of the shares specified in the warrant for being a director of the company.

Entries on issue of share warrants.

5. On the issue of a share warrant the company shall remove from its books the name of the shareholder then entered therein as holding such share or shares as if he had ceased to be a shareholder, and shall enter in such books the following particulars, namely:

(i) the fact of the issue of the warrant;

(ii) a statement of the shares included in the warrant, and

(iii) the date of the issue of the warrant.

Surrender of warrant.

6. Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the books of the company in respect of such share or shares, and, on the surrender, the date of the surrender shall be entered as if it were the date at which a person ceased to be a shareholder.

Warrant holders not considered where vote of definite part of stock required.

7. Unless the bearer of a share warrant is entitled to attend and vote at general meetings, the shares represented by such share warrant shall not be counted as part of the stock of the company for the purposes of a general meeting. 4-5 Geo. IV., 1914, c. 23, s. 2.

Transfer of shares.

1. Transferability of shares.
2. Necessity for registration.
3. Share warrants.
4. Death of shareholder.
5. Lost or stolen certificates.
6. Proof of transfer.
7. Rights of unregistered transferee against attaching creditor.
8. Restrictions on transfer.
9. Transfers to escape liability.
10. Ineffectual and invalid transfers.
11. Effect of informalities and irregularities.
12. Estoppel.
13. Form of transfer.

14. Remedies for refusal to register transfer. Sects. 64-68A.
15. Sale of shares—Contractual relation of transferor and transferee.
16. Conflicting claims to shares before registration.
17. Shares held in trust—Rights of transferees.
18. Loans on the security of shares.
19. Loan of shares.
20. Transfer practice.

1. Transferability of shares.

Shares in the capital stock of a company are personal estate and transferable as such by the shareholder, s. 45, and see *Re Polson Iron Works* (1912) 3 O. W. N. 1269, 4 D. L. R. 193. For a definition of the term "share" see *Borland's Trustee* v. *Steel Brothers & Co.* (1901) 1 Ch. 279 at p. 288.

Company transferee.

A company as well as an individual may become the owner of shares by transfer, provided in the case of a Dominion company that it has the power to hold shares conferred upon it by its charter and that it has complied with the provisions of s. 44 as to which see the notes to that section. A company itself can not purchase its own shares either directly, or indirectly, as by taking a transfer to its manager "in trust," *Re Union Fire Insurance Co., McCord's Case* (1891) 21 O. R. 264.

Infant transferee.

A transfer to an infant should not be permitted by the company especially if the shares are not fully paid-up; for an infant would be entitled to repudiate the shares on attaining majority: *Re Sovereign Bank of Canada, Clark's Case* (1915-16) 35 O. L. R. 448 at p. 456, and in the meantime calls could not be enforced against him.

Infant transferor.

A transfer of shares by a minor is, like other contracts, voidable not void, and being voidable only the company must register the transfer if it has not been avoided before the date of application for registration.

Lunatic.

Where shares have been acquired by a person who thereafter becomes a lunatic these may be transferred by his committee; as to the procedure in such cases in Ontario see the Lunacy Act R. S .O. (1914) c. 68. The Succession Duty Acts of most provinces forbid the transfer by foreign

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executors or administrators of deceased shareholders of shares of a company whose head office is in the province until succession duty has been paid or security given therefor. After the commencement of a winding-up no transfer of shares can be made without the sanction of the liquidator under the authority of the court. Where, as under the Ontario Companies Act, R. S. O. 1914, c. 178, s. 54 (2), the share certificate is made *prima facie* evidence of the title to the shares, the holder has *prima facie* evidence of title to compel the company to register the shares in his name: *Lorsch & Co.* v. *Shamrock Consolidated* (1917) 39 O. L. R. 315; 36 D. L. R. 557.

Foreign executors.

After winding-up.

2. Necessity for registration.

In the absence of special provision in the governing act or charter imposing conditions to the contrary an assignment of shares duly executed by assignor and assignee, for good consideration, with proper notice to the company, is valid without further registration: *Crawford* v. *Provincial Insurance Co.* (1859) 8 C. P. 263.

Under the present Companies Act registration of the transfer is required to complete it, so as to constitute the transferee a shareholder in the strict sense. Section 45 provides that "the stock in the company shall be personal estate, and shall be transferable, in such manner and subject to all such conditions and restrictions as are prescribed by this Part or by the by-laws of the company." Section 64 makes entry of the transfer in the register of transfers necessary for its validity, subject to the reservations mentioned in the section. Until the transfer is registered the transferor and transferee remain jointly and severally liable to the company and its creditors, s. 64. It was, however, held in *Hamilton* v. *Grant* (1900) 30 S. C. R. 566, that an unregistered transferee who had acted as an officer of the company and required the shares in question to qualify him as such, became a shareholder and that his transferor was not liable as shareholder to the creditors of the company. Even without registra-

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tion, as between the parties, a transfer is valid and the company cannot refuse to register the transfer owing to non-payment of a call made after the date of the transfer but prior to the application for registration, *Re Polson Iron Works, Limited* (1912) 3 O. W. N. 1269, 4 D. L. R. 193. Additional formalities, unless required by the charter or by-laws, are not necessary to make the transfer complete and effective; thus where the transfer had been registered and the transferee had in fact accepted the shares, signature by the transferee of formal acceptance was held to be unnecessary, not being required by the incorporating act, charter or by-laws: *Ross* v. *Machar* (1885) 8 O. R. 417; see also *Woodruff* v. *Harris* (1850) 11 U. C. R. 490.

Transfer by indorsement in blank.

The exigencies of modern business often make it inconvenient or impossible for the transferee, or each of successive transferees to get himself registered as the holder of the shares dealt with. A transfer of shares may, accordingly, be regarded from two standpoints—first, from a commercial standpoint, and, secondly, from a strictly legal standpoint. On the Stock Exchange the transfer is usually effected by delivery of the shares endorsed in blank, the transfer not to be registered on the books of the company unless specially requested. The transfer confers on the holder of the certificate for the time-being, authority to fill in the name of the transferee, and each successive holder passes on this authority when he delivers the certificate to his immediate transferee. In general the holder for the time being takes not the property in the shares but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner: *Colonial Bank* v. *Cady* (1890) 15 App. Cas. 267; *Smith* v. *Rogers* (1899) 30 O. R. 256; *Fuller* v. *Glyn Mills* (1914) 2 K.B. 168; *Macdonald* v. *Bank of Vancouver* (1916) 25 D. L. R. 567.

The existing practice of transfer by delivery is expressly recognized by s. 64 of the Act in the case of s. 64.

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shares of a company listed and dealt with on any recognized stock exchange; but the person so acquiring shares does not become a shareholder until he has the transfer registered, and a company can not dispense with registration or issue shares expressed to be transferable by delivery: *General Company for Promotion* (1870) L. R. 5 Ch. 363. The transferee furthermore before registration does not enjoy the right of voting at meetings of shareholders, s. 64. He also runs the risk of dividends being collected by the transferor, who, until the transfer is registered, is the only person known to the company, and therefore the person to whom the dividend cheques will be sent.

s. 64.

In the absence of decided cases it is doubtful how far s. 64 makes shares transferable by delivery and whether it applies to what are known as "listed" shares generally or whether it is necessary that the specific shares acquired must have been bought through the medium of a stock exchange transaction. This doubt is not removed by the amendment, s. 68A, providing for the issuing of share warrants which are transferable by delivery under all circumstances. Where the transferee expects to hold the shares it is, of course, advisable to have the transfer completed on the books of the company. In any event as the shares of only a small proportion of companies are listed it is important to consider the general law as to the necessity for registration of transfers and the effect of failure to do so.

Effect on liability.

Until registration the transferor and transferee remain jointly and severally liable to the company and its creditors for the amount unpaid on the shares. *Quære,* as to liability where there has been a succession of transfers by delivery without registration.

Transfers which are unobjectionable ought to be confirmed by the directors without delay, and it would seem that a company which was guilty of negligence in not registering a transfer, should not be allowed to take advantage of its own neglect to hold the transferor liable jointly and severally with the transferee.

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Long delay on the part of the company has been held not to release the transferee from being placed on the list of contributories where a transfer had actually been registered before the winding-up: *Sichell's Case* (1867) L. R. 3 Ch. 119, distinguished in *Re Cole and The Canada Fire and Marine Insurance Co., Close's Case* (1885) 8 O. R. 92. Where the transferor himself neglected to cause to be registered a transfer made years before the winding-up order he was retained as a contributory, for although the company was in default in delaying to register the transfer the shareholder was also in default and therefore not entitled to relief: *Walker's Case* (1868) L. R. 6 Eq. 30. See also as to laches *Shepherd's Case* (1866) 2 Ch. App. 16; *Ward and Henry's Case, ibid.* 431; *Head's Case* (1866) L. R. 3 Eq. 84; *Ex parte Bibby, Re Enterprise Mining Co.* (1884) 1 B. C. R. 11. In order to protect himself, therefore, the vendor should compel the purchaser to register the transfer, and if he does not do so, he must suffer for his own default, and his name being on the register at the date of the winding-up he must remain there unless there is laches on the part of the company: *Head's Case, White's Case, supra.*

Shares not negotiable.

Shares in a company are not negotiable and although they may pass by delivery this is subject to the equities: *Smith* v. *Walkerville* (1893) 23 A. R. 95. In this case the company had issued a certificate for shares (not numbered or identified) which stated that these were "transferable only on the books of the company in person or by attorney on the surrender of this certificate." This provision was not required either by the statute or the company's by-laws. The holder handed the certificate with assignment endorsed to the plaintiff, who gave valuable consideration therefor. The plaintiff failed to apply for registration or notify the company for several months, and in the meantime his transferor transferred the shares for value to an innocent transferee who got himself registered without production of the certificate. The Court of Appeal held that the plaintiff's equitable title was cut out by

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the subsequent transfer and registration and that although the company ought to have insisted on the production of the certificate, it was not compelled to do so and was not estopped from denying the plaintiff's title.

The delivery of a share certificate endorsed in blank is not equivalent to a transfer or alienation of the certificate: *Bonner* v. *Moray* (1914) 23 Que. K. B. 252.

Risks of holder of unregistered transfer.

The holder under an unregistered transfer takes the shares subject to any infirmity in the title of the person from whom he acquires them, *e.g.,* if they were stolen he would get no title at all. The defect in title of the immediate transferor will not in all cases prevent the transferee from getting himself registered; the registered owner of the shares may be estoppd from denying the title of the holder as was held under the following circumstances:—The registered owner of shares in a company gave to her brokers, for the purpose of selling the shares, the certificate of ownership, upon the face of which the shares were said to be transferable on the books of the company in person, or by attorney upon surrender of the certificate, and upon which was endorsed a transfer and power of attorney signed by her, and having a blank left for the name of the transferee. The brokers improperly deposited the certificate as security for advances to them with a bank, who received it in the ordinary course of business without any notice of the owner's rights. There was evidence at the trial that, according to the usages of the stock exchanges of Ontario and Quebec, such a share certificate, so endorsed passes from hand to hand, and is recognized as entitling the holder to deal with the shares as owner, and pass the property in them by delivery, or to fill in the blank with his own name, and have the shares so registered on the books of the company. The Court held (1) that such a transfer passed the title to the bank. (2) That the original holder having placed it in the power of his broker to transfer the shares was estopped from questioning what had been done. (3) That under the circumstances

detailed a transferee for value is not put on enquiry as to the rights of antecedent owners, nor as to the title of his immediate vendors: *Smith* v. *Rogers* (1899) 30 O. R. 256, distinguishing *France* v. *Clark* (1884) 26 Ch. D. 257.

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A lender advancing money in good faith on shares deposited with him and endorsed in blank is not bound to make enquiries as to whether the registered owner has any claim on the shares: *Macdonald* v. *Bank of Vancouver* (1916) 25 D. L. R. 567. In the last mentioned case evidence of the usage of the monetary world that certificates endorsed in blank are regarded as bearer securities on which bankers make advances, if it was required at all, was supplied by the evidence of the superintendent for British Columbia of a chartered bank.

A transferee who fails to have his transfer registered may lose his shares by a fraudulent transfer on the books of the company by the registered holder to a *bona fide* purchaser. In such case he has no action against the corporation for allowing such transfer: *Smith* v. *Walkerville* (1896) 23 A. R. 95.

The right to registration does not depend on the possession of the certificate, and where the certificate states that it is transferable only "on surrender of this certificate," the company may waive such a provision: *Shropshire Union Ry. Co.* v. *The Queen* (1875) L. R. 7 H. L. 496, 509; *Smith* v. *Walkerville Iron Co., supra.*

There will be no estoppel against the registered owner where the blank endorsement is followed by restrictive words. In *Mathers* v. *Royal Bank of Canada* (1913) 29 O. L. R. 141; 14 D. L. R. 27, the registered owner handed his broker a certificate for 46 shares instructing him to sell 25 shares and endorsed the certificate in blank, adding in writing the words "twenty-five" as indicating the number of shares to be dealt with. The certificate was deposited by the broker with a bank to secure advances, and the bank sold the stock in order to realize the security, the bank's agent strik-

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ing out the words, "twenty-five" in the endorsement. It was held by Boyd, C., that the manner of endorsement gave notice to all concerned that only twenty-five shares were to be used and the endorsement reading "hereby sell, assign and transfer unto . . " that was notice that the shares were to be used for selling, not pledging, and the bank was liable to account for the full value of the shares sold. Nor will the person, who has transferred shares in blank where the transfer is not in order, be estopped if the person to whom the shares are handed, fraudulently deals with them. In *Colonial Bank* v. *Cady* (1890) 18 App. Cas. 267, executors not registered as shareholders in respect of shares of their testator had endorsed them in blank, and the broker to whom the shares had been handed, fraudulently deposited them with his bank to secure a personal debt. It was held that the fact of the certificates being signed by such executors put two interpretations on their leaving the certificates with the broker; either he was to sell them or procure registration in their names; the bank should have enquired which of the two reasons was the cause of the deposit, and the executors were not estopped.

As between persons whose rights are equitable only, *i.e.,* where neither has perfected his title by registration or acquired an unconditional right to be registered, the title of the person whose equitable title is prior in time prevails: *Peat* v. *Clayton* (1906) 1 Ch. 659.

3. Share warrants.

If shares have been fully paid up the company can take advantage of s. 68A and issue share warrants making the bearer absolutely entitled to the shares in respect of which the share warrant is issued. Share warrants are transferable by delivery; the company keeps no record of the holders, and even if a share warrant is stolen and is later acquired by a *bona fide* purchaser for value he is entitled to keep it and the former holder has no redress either against him or against the company: *Webb Hale, &c.* (1905) 93 L. T. 339. The

holder of a share warrant does not lose the right to vote on his shares unless the regulations of the company so provide, but the shares specified in the warrant will not qualify him as a director, s. 68A (4).

The power to issue share warrants must be taken in the letters patent. In the petition for incorporation it is not sufficient to ask for the power merely; the regulations respecting share warrants must also be set out.

4. Death of shareholder.

Where a shareholder of a company dies his shares as personal estate vest in his executors or administrators, and the estate is liable for any balance due on his shares: *Baird's Case* (1870) L. R. 5 Ch. 725; *Clarkson* v. *McLean* (1917-18) 42 O. L. R. 1, but the executors or administrators do not *ipso facto* become members of the company at common law, nor is the company entitled without their consent to register them as members: *Buchan's Case* (1879) 4 App. Cas. 588. But see s. 3 (d) of the Act.

5. Lost or stolen certificates.

Share certificates are not negotiable, and if a certificate is lost or stolen from the owner without fault on his part his right to it is superior to that of any other person who may acquire it by purchase for value from any other holder, and he may maintain an action to establish his right to it against the corporation or the person who holds it: *Smith* v. *Rogers* (1900) 30 O. R. 256.

6. Proof of transfer.

A register of transfers is required to be kept by s. 90 of the Act, and particulars of every transfer must be entered therein. In any action against the company or against any shareholder the entries in the register of transfers will be *prima facie* evidence of the facts they purport to state, s. 107. See also *Provincial Insurance Co. of Canada* v. *Shaw* (1859) 19 U. C. Q. B. 533, where it was held that a transfer was sufficiently

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proven without producing the power of attorney to the manager to make the transfer on the books of the company.

7. Rights of unregistered transferee against execution creditor.

Section 64 provides that "except for the purpose of exhibiting the rights of parties" no transfer shall be valid for any purpose whatever until registration. What then is the position of a creditor of the transferor who causes an execution to be levied against the shares before they have been registered in the name of the transferee? If the transfer is *bona fide* and for value, as only the debtor's interest in the property seized can be sold, a sale under execution can not have a tortious effect so as to defeat the title of the transferee: *Morton* v. *Cowan* (1894) 25 O. R. 529; *Wilkie* v. *Jellet* (1895) 2 Terr. L. R. 33. In *Brock* v. *Ruttan* (1851) 1 U. C. C. P. 218, the contrary had been held, but *Morton* v. *Cowan* was a decision of a Divisional Court and was followed in *Snetzinger* v. *Leitch* (1901) 32 O. R. 440, and in *Montgomery* v. *Wrights, Ltd.* (1916-17) 38 O. L. R. 335, and must be taken to be the law in the Province of Ontario.

In the last mentioned case an unregistered transfer, made before a seizure by the sheriff, although the writ of execution was in the sheriff's hands before the transfer, was held to be good as against a purchaser at the sheriff's sale, subject to proof of the transfer's being *bona fide*. The purchaser's application to the Court was refused unless he should elect to take an issue as to the *bona fides* of the transferee's claim.

In *Morton* v. *Cowan*, Boyd, C., observed that the provision in the statute is not aimed at dealings between the holder and others pending which an execution intervenes. It does apply, of course, as between successive transferees; see *Moore* v. *North Western Bank* (1891) 2 Ch. 599, and *Roots* v. *Williamson* (1888) 38 Ch. D. 485; and is intended to keep on foot the liability of the registered shareholder to the company and its creditors in respect of his shares (in the event of

their not being fully paid up) until the liability of a transferee whose title has become complete by registration is substituted, see *Denison* v. *Smith* (1878) 43 U. C. Q. B. 503. Sects. 64-68A.

Where the transferor still retains an interest in the shares, *e.g.*, where the transfer is by way of pledge only and not an out and out transfer by way of sale, the Ontario Execution Act, R. S. O. 1914 c. 80, s. 19, enables the equity of redemption to be sold by the sheriff. The Execution Acts of the various provinces contain special provisions regulating the procedure where it is desired to seize shares under an execution. Execution creditor.

Where the company is a Dominion company having a place of business in Ontario but its head office in Quebec, *semble*, the remedy of an execution creditor in Ontario is to make a seizure of the shares under the Execution Act, R. S. O. 1914, c. 80, s. 12 *et seq.*: *Herold* v. *Budding* (1916) 37 O. L. R. 605. *Quære*, whether the company is "a company in Ontario" within s. 140 of the Ontario Judicature Act so as to permit a charging order to be made, *ibid.*

8. Restrictions on transfer—Refusal to register.

The Act makes special provisions as regards transfers in three cases, viz., unpaid shares, shares with calls unpaid thereon, shares of a shareholder who is indebted to the company.

(*a*) *Shares not fully paid up* (s. 65).

Here the consent of the directors is necessary, s. 65. The section says no transfer shall be made, but it is submitted that what is meant is that no transfer shall be recognized by the company and that the directors are not bound to permit entry of the transferee's name as shareholder. An express consent by the directors need not be shown, the consent may be inferred from the way the shares have been dealt with in the company's books: *In re Bankscа Island Co., Ex parte Bentick* (1888) 1 Meg. 23 C. A. Where the share certificate does not expressly state on its face that the shares are paid up, the company is not estopped from

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showing that the shares are not fully paid, and may refuse registration of the transferee as the holder of fully paid shares: *Beauchemin* v. *Richelieu Foundry Co.* (1908) Q. R. 34 S. C. 261. The question arises whether under this section the directors are entitled to refuse their consent in any case or whether only for certain reasons, and if so, for what reasons. The object of the section must be looked at, which is to prevent the substitution of a shareholder of less for one of greater pecuniary responsibility. At any rate, that is the principal element to be regarded by the directors in exercising their discretion: *In re the Ceylon Land and Produce Co., Limited, ex parte Anderson* (1890-1) 7 T. L. R. 692. Section 83 of the Act looks in the same direction. By that section directors are made responsible to creditors if they permit a transfer of unpaid shares to a person who is not apparently of sufficient means to pay them up in full. Accordingly, if a transferee who was refused registration were able to show that he was financially able to pay up the share it is difficult to see how directors could justify a refusal based on s. 65 to consent to the transfer.

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Where the directors have a discretionary power to decline to register transfers, the secretary, in the absence of authority from them to register transfers at once, is not entitled to do so and the directors may refuse to pass a transfer so registered: *Chida Mines, Ltd.* (1905-6) 22 T. L. R. 27.

While directors have a discretionary power to register transfers, *Macdonald* v. *Mail Printing Co.* (1876) 6 P. R. 309, the discretion must be registered in a reasonable manner: *Poole* v. *Middleton* (1861) 29 Beav. 646; *London and Birmingham Banking Co.* (1865) 34 Beav. 332. A power of this kind is a fiduciary power to be exercised for the benefit of the company: *Re Coalport China Co.* (1895) 2 Ch. 404; *Upton* v. *Hutchinson* (1899) 2 Que. P. R. 300; *Peterborough Cold Storage Co.* (1907) 14 O. L. R. 475.

A shareholder is not entitled as of course on the eve of liquidation to send in a transfer and insist on its registration. The directors are entitled and even

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bound to refuse registration if the rights of creditors have in fact intervened, though winding-up has not commenced. If the directors in the fair and bona fide exercise of their powers and in the circumstances which make it a reasonable act of management, resolve not to record future transfers which may seriously affect and alter the liability of the members, the resolution may be effectual: *Alex. Mitchell's Case* (1879) 4 App. Cas. 548; *Rutherfurd's Case, ibid.; Nelson Mitchell's Case, ibid.*, 624.

The insolvency of an assignee of shares was in some of the older cases held to be no objection to the transfer, the only condition for a valid transfer being the payment of all calls: *Moore* v. *MacLaren* (1862) 11 C. P. 534, and *Re Provincial Building Society* (1891) 30 N. B. 628, but this situation appears now to be overcome by the discretionary power vested in the directors.

(*b*) *Shares with calls unpaid thereon.*

Shares with calls thereon unpaid are made by s. 66 *res extra commercium*, they are not transferable and neither the consent of the directors nor any action by the company can validate an attempted transfer: *Smith* v. *Gowganda* (1911) 44 S. C. R. 621. The prohibition of the section extends to an unpaid liability in respect of shares even though it is not technically a call; and in *Peterborough Cold Storage Co.* (1907) 14 O. L. R. 475, transfers by directors of their shares were held to be invalid where the directors had exacted a payment of twenty-five per cent. from the other subscribers, but had excused themselves from paying anything and had transferred their shares to persons of no substance in order to escape liability.

But the section does not apply where the liability is not in respect of a call but in respect of instalments due under agreement: *Re Port Arthur Wagon Co., Tudhope's Case* (1919) 45 O. L. R. 260. Middleton, J., distinguished *Re Peterborough Cold Storage Co., supra*, and dissented from the dictum of Duff, J., in *Smith* v.

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Gowganda, supra, and referred to *In re Hoylake Ry. Co., Ex p. Littledale* (1874) L. R. 9 Ch. 257.

Restrictions on transfer.

Where shares are purchased while calls are pending they cannot be transferred until such calls are paid and the brokers purchasing are not liable for failure to transfer: *Farrell* v. *Ritchie* (1877) 1 L. N. 76.

The non-payment of amounts claimed under an illegal and ineffective call does not prevent a valid and effective transfer of shares: *Moore* v. *MacLaren* (1862) 11 C. P. 534.

(*c*) *Shares of a shareholder who is indebted to the company.*

If the transferor is indebted to the company, not necessarily in respect of amounts due on the shares, the directors may decline to register a transfer of shares by him, s. 67; Imp. Act, 1862, Table A. 10. This right is in the nature of a statutory lien and it was held in *McMurrich* v. *Bondhead Harbor* (1852) 9 U.C.Q.B.333, that there was no common law lien for general indebtedness to the company; and where the incorporating Act did not confer the right it was held that a by-law providing for such a lien did not affect a purchase in good faith of the shares: *McKain* v. *Canadian Birkbeck* (1904) 7 O. L. R. 241. See also *Montgomery* v. *Mitchell* (1908) 7 W. L. R. 518. The company can assert its lien against an execution creditor of the shareholder, *ibid.* As to when the company will be estopped from asserting its lien, see *Box* v. *Bird's Hill Sand Co.* (1913) 12 D. L. R. 556, 23 Man. L. R. 15, and *Cook* v. *Royal Canadian Bank* (1873) 21 Gr. 1. The indebtedness of the shareholder must exist at the time when the transfer is executed, and the fact that the shareholder has become indebted to the company before the application for registration by the transferee does not justify a refusal by the directors to register: *Re Polson Iron Works* (1912) 3 O. W. N. 1269, 4 D. L. R. 193. Under the Imperial Act the material point of time is the date when the transfer is presented for registration: Buckley, 8th ed., 518. When the registered shareholder is a trustee, the company has not a

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lien on the shares for the debt of the *cestui que trust; Re Perkins* (1890) 24 Q. B. D. 613. Even where the governing Act provides that no notice of any trust shall be entered on the register and the articles state that the company shall not be bound to recognize any equitable interest, the company in the face of actual notice that the registered shareholder is not the beneficial owner, can not make advances to the shareholder and assert a lien on the shares against the beneficiaries: *Mackereth* v. *Wigan Coal and Iron Co.* (1916) 2 Ch. 293, 85 L. J. Ch. 601. The lien may be discharged by waiver or by agreement by the company with the shareholder incompatible with the continuance of the lien. A mere agreement, however, by a company with a shareholder indebted to it that the company may sell certain of his shares on the expiry of an extension of time given him within which to pay, in consideration of his making such agreement, will not itself amount to an abandonment of the lien: *Bank of Africa, Limited* v. *Salisbury Gold Mining Co., Limited* (1892) A. C. 281.

(*d*) *Other attempted restrictions on transfer.*

Subject to the above exceptions and to the special provisions affecting "private companies" no restriction on the transferability of shares is authorized by the Act and directors have no discretion to refuse the registration of a *bona fide* transfer of paid up shares: *In re Imperial Starch Co.* (1905) 10 O. L. R. 22. Moreover, directors cannot refuse to register transfers of shares to nominees to increase the voting power of a shareholder unless there is express power to decline: *Stranton Iron and Steel Co.* (1873) L. R. 16 Eq. 559.

It has been attempted to fetter the right to transfer shares in various ways. In *Smith* v. *Bank of Nova Scotia* (1882) 8 S. C. R. 558, it was unsuccessfully sought to be done by resolution; see also *Re Dominion Oil Co.* (1903) 2 O. W. R. 826. In *Good and Jacob Y. Shantz Co., Limited* (1911) 23 O. L. R. 544 a by-law passed for this purpose was the means adopted. The company relied on s. 45 of the Act, which says that shares shall be transferable in such manner and sub-

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ject to such conditions and restrictions as are prescribed by Part I of the Act or by the letters patent or the by-laws of the company. It was held, however, that such a by-law was invalid and that the above section must be read in conjunction with the sections relating to the transfer of shares and sections 80 and 81 dealing with the powers of directors. Moss, C.J.O., at page 548, stated the result of these sections in the following words: "Nothing in these matters indicates the assertion of a power to prevent the transfer except by consent of the directors, in any case in which the Act has not expressly authorized it. Forms of transfers, and certificates and records of transfers, there must be, in order to ensure accuracy and ease in tracing the title of shares transferred from time to time; and such necessary conditions and restrictions as the attainment of that object calls for are reasonable and fair. In these ways the by-laws may regulate the transfer of stock without at all interfering with or hampering its ready saleability. These are provisions which regulate, in the true sense of the word, the transfer of stock; and the power given by the Act extends no further. When sections 45 and 80 are read together, it seems plain that the by-laws of the company spoken of in section 45 mean those relating to transfer of stock which sec. 85 authorizes, and these are limited to regulation." This case has recently been approved by the Judicial Committee of the Privy Council in *Canada National, &c. Co.* v. *Hutchings* (1918) 87 L. J. Ch. 106, a case decided in reference to a company incorporated under Part II.

In *Re Belleville Driving and Athletic Association* (1914) 31 O. L. R. 79, an agreement had been entered into by the incorporators before the issue of the letters patent to the effect that no shares should be transferred without the consent of the shareholders; a similar agreement it was alleged had been entered into between the shareholders and the company and by each shareholder with the others. It was held that such agreements did not attach to the shares the incident of non-transferability without the

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consent of all the shareholders and that the only remedy for a breach of such an agreement was an action for damages, or, possibly, an injunction to restrain a threatened breach. The distinction between a restriction imposed by agreement and one appearing in the articles of association of the company which has been held in English cases to be valid is explained by Meredith, C.J.O., at pp. 85 and 86 of the report as follows: "In the latter case the agreement forms part of the very constitution of the company, and every one who deals with the company or with respect to shares in it has an opportunity of examining it, while in the former it is a collateral agreement and is not embodied in its constitution, and such a person would have no means of knowing of its existence." In *Barnard* v. *Duplessis Independent Shoe Machinery Co.* (1907) Q. R. 31 S. C. 362 an agreement signed by all the shareholders engaging that before any sale of shares they should first be offered to certain individuals, was held to be binding only on the shareholders individually. The company being a stranger to the agreement could not enforce it. See also *Montgomery* v. *Mitchell* (1907) 18 Man. L. R. 37; *Société Canadienne, &c.* v. *Daveluy* (1892) 20 S. C. R. 449; *Barnard* v. *Desautels* (1909) Q. R. 19 K. B. 114, 121; *Barnard* v. *Duplessis* (1907) Q. R. 31 S. C. 367, 368, 369.

It may be mentioned that an endorsement on the face of each share certificate of the fact and the exact nature of the restriction against transfer, would answer the practical objection urged above against a secret clog on transferability. Possibly, notice so conveyed would be an effective answer to a transferee claiming registration, at any rate if he had seen the certificates before paying the consideration for the transfer to his transferor. See on the effect of notice *McKain* v. *Canadian Birkbeck Co.* (1904) 7 O. L. R. 241 on which some doubt is cast by Meredith, C.J.O., in *Re Belleville Driving and Athletic Association, supra.*

Although a restriction on the transfer of shares can not be imposed by agreement or by-law it can be

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effectively done by the inserting of an appropriate provision in the letters patent themselves, per Meredith, C.J.O., in *Re Belleville Driving and Athletic Association* (1914) 31 O. L. R. at p. 86; or if a number of the shareholders desire that their shares should not be transferable they can transfer them to a trustee or to a holding company. In some jurisdictions, *e.g.*, Ontario, and now under the Dominion Act, provision is made for the incorporation of "private" companies, one of the incidents of which is a restriction on the transfer of their shares.

9. Transfers to escape liability.

As has been mentioned above, the consent of the directors is required before shares not fully paid-up can be transferred. If, however, such consent is obtained so that the transfer is registered the transferor escapes liability on his shares.

It is necessary, however, that the transfer should be an out and out transfer, reserving to the transferor no beneficial right to the shares, and it is necessary further that registration be not obtained by the use of unfair means on the part of the transferor: *Discoverers' Finance Corporation, Lindlar's Case* (1910) 1 Ch. 316 (C. A.). With regard to what constitutes obtaining registration of a transfer by unfair means, Buckley, L.J., in the foregoing case laid down the two following rules:—"The transferor will not escape liability, (1) if he has actively by falsehood, or passively by concealment, induced the directors to pass and register a transfer (even though it be an out and out transfer) which if he had not so deceived or concealed, they would have refused to register. Here again the question is one of fact. It is not sufficient to show that the transferee's address was incorrect, or that the description of his occupation was not accurate, or the like. The Court must arrive at the conclusion that therefrom resulted such a state of things that, if the directors had known the truth, they would not have registered the transfer (at p. 321)."

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(2) If "the transferor has obtained the advantage of executing and registering his transfer to a man of straw upon an opportunity obtained by him fraudulently in breach of some duty which he owed the corporation—as, for instance, if he (being in a position so to do) have procured the postponement of the commencement of the winding-up in order to get time to execute and tender such a transfer for registration, or if by collusion with the directors he has procured them in breach of their duty to pass a transfer which they ought not to have passed." (At p. 322).

The following further propositions were laid down in *Lindlar's Case*:—Whether a transfer is out and out is a question of fact; it is immaterial that as between the transferor and transferee there is an obligation on the part of the former to indemnify the latter in whole or in part.

Transfer of bonus shares.

Many cases have arisen in which shares issued as fully paid-up have left their holders liable for calls. If the original holder of such shares transferred them as fully paid-up, it is now clearly settled that the shares must, in the hands of the transferee who has purchased them without notice of the circumstances under which they were issued, be treated as fully paid and the liability on the shares remains in the transferor: *British Farmers' Co.* (1878) 7 Ch. D. 533; *Burkinshaw* v. *Nicholls* (1878) 3 App. Cas. 1004.

Where a transfer of bonus shares is made by a director to a transferee who becomes entitled to hold them as fully paid-up and so escapes liability to the company as a contributory the director so transferring may be liable to the company for breach of trust under section 83: *Wiarton Beet Root Sugar, Freeman's Case* (1906) 12 O. L. R. 149.

10. Ineffectual and invalid transfers.

If a shareholder disposes of his shares by an invalid transfer or by means which are legally ineffectual to relieve him of them, he will remain liable in respect of the shares and this although he be entirely

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innocent in the matter, for if a person be once a shareholder he will remain a shareholder until he can show that he has in some lawful way got rid of his liability: *Addison's Case* (1870) L. R. 5 Ch. 294 at p. 397; *Bell's Case* (1879) 4 App. Cas. 550. A transfer of shares to the company itself for cancellation will not do away with the liability of the shareholder: Re *Winnipeg Hedge and Wire Fence Co. Ltd.* (1913) 22 Man. L. R. 83 and see *Smith* v. *Gowganda* (1911) 44 S. C. R. 621.

Ineffectual and invalid transfers.

Where the manager of an insurance company by the authority of the directors purchased from the holder partly paid-up shares on which calls were in arrear for the purpose of cancellation, taking the transfer to himself as manager "in trust" and the shares were never cancelled, the dividends thereon being credited to the company, it was held that the manager was properly placed on the list of contributories, the company having no power to deal in its own stock and the transferor being ignorant of the illegal purpose: *McCord's Case* (1891) 21 O. R. 264. In such case the transfer is illegal, but whether liability on the shares is transferred or not depends on the knowledge or ignorance of the prior holder, *ibid.*

It should be remembered that a transfer which is made with the object and has the effect of reducing the capital stock of the company, is void, and all resolutions of the company and directors, authorizing such transfer, are illegal and *ultra vires*: *Ross* v. *Worthington* (1882) 5 L. N. 140; *Ross* v. *Fiset* (1882) 8 Q. L. R. 251; and a transfer to a nominee of the company leaves the transferor liable: *Addison's Case* (1870) L. R. 5 Ch. 294.

11. Effect of informalities and irregularities.

A transfer may be valid if *bona fide* even though made and registered without formally complying with the usual procedure. Where a shareholder who was also a director notified the company that he desired to withdraw and the provisional directors, there being at that stage of the company's organization no

proper register of transfers and no by-laws governing the same, erased the shareholder's name from the company's book, noted the date on which the director retired, and purported to transfer the stock to a person who thereafter became president of the company, all of which was approved by the shareholders—this transaction was held to be in effect a transfer of the share and a substantial compliance with the act: *Re Sprouted Food Co., Hudson's Case* (1905) 6 O. W. R. 514. But if there is no transfer in fact of shares and acceptance thereof by the transferee the case is different. In *Re Publishers' Syndicate, Paton's Case* (1903) 5 O. L. R. 392 the directors of the company erroneously believing that there was no unallotted stock, procured powers of attorney from several persons authorizing an agent "to receive from the vendors a transfer" of a specified number of "shares in the company purchased by me from him" and "to sign in the books of the company my name and acceptance to the transfer thereof." No transfer was actually made of the shares by any vendor and appointors who took shares from the company, some of them signing applications and some of them not, were held to be original allottees of the shares and liable as such.

Informalities and irregularities.

12. Estoppel.

The rights of transferors and transferees are frequently affected by the law of estoppel as applied to a transaction in which they have been engaged. The following cases illustrate the application of the doctrine on this subject.

Upon the facts disclosed it was held that a person who had paid one call after assigning his shares and after the assignment had been accepted and registered by the company was not estopped from proving the assignment as an answer to an action for the second call: *Provincial Insurance Co. of Canada* v. *Shaw* (1860) 19 U. C. R. 533. Where a transfer of shares was made to qualify the transferee to act as a director, an action by the transferors against

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the devisee of the transferee to have it declared that the assignment was made to the transferee as trustee for the plaintiffs and for a re-assignment was dismissed: *Kiely* v. *Smith* (1879) 27 Gr. 220.

Where a statutory liability which can only attach to an actual legal shareholder in the company is attempted to be enforced against a person, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock: *Page* v. *Austin* (1882) 10 S. C. R. 132. Although A. had taken a transfer of shares absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer of shares was by way of mortgage: *Page* v. *Austin* (1882), 7 A. R. 1, 10 S. C. R. 132.

Estoppel.

After a winding-up order has been made it is too late for holders of shares entered as such in the books of a bank in liquidation to escape liability by showing irregularities in transfers to their predecessors in title, or in the original issue of the shares: *Re Central Bank of Canada, Home Savings and Loan Co. Case* (1891) 18 A. R. 489.

A company is estopped from denying that the person to whom a share certificate has been granted is the registered shareholder entitled to the specific shares included in the certificate; and in case of a *bona fide* transferee, without notice to the contrary, that the amount certified to be paid has been paid, and this even against the creditors of the company: *McCraken* v. *McIntyre* (1877) 1 S. C. R. 479.

Where the defendant at the request of the president of the company accepted a transfer of shares partly paid-up to enable him to attend a meeting of shareholders and form a quorum, which he did, and gave the president power of attorney to re-transfer shares after the meeting, but no re-transfer was ever made, it was held that he was liable as a contributory: *Ontario Investment Co.* v. *Leys* (1893) 23 O. R. 496.

The question has been raised but not settled as to how far the transferee steps into the shoes of the

transferor so as to be bound by all acts (for example of acquiescence) of his transferor. See *Ashbury* v. *Watson* (1885) 30 Ch. D. 376; *London Trust Co.* v. *McKenzie* (1893) 62 L. J. Q. B. 870.

13. Form of transfer.

Sections 45 and 80 of the Act provide that the form of transfer may be prescribed by the by-laws and in actual practice this is always done, the usual form of by-law being as follows:—

"A share transfer book shall be provided in such form as the board of directors may approve of, and all transfers of shares in the capital stock of the company shall be made in such book, and shall be signed by the transferor, or by his attorney, duly appointed, in writing, and the said share transfer book shall be kept at the head office of the company, and all transfers of shares shall be registered therein."

A usual form of transfer and power of attorney endorsed on the back of the share certificate is as follows:

"For value received hereby sell, assign and transfer unto shares [Nos. to] represented by the within certificate and do hereby irrevocably constitute and appoint attorney to transfer the said shares on the books of the company with full power of substitution in the premises.

"Dated this day of 191 .

"In the presence of

....., ..."

Where a given form of transfer is made compulsory by the by-laws it must be followed and the directors should refuse to register a transfer not in proper form. Small deviations, however, will not justify the rejection of a transfer which substantially complies with the regulations. Thus it has been held that the absence of the denoting numbers of the shares (where the shares were required to be distinguished by number) and the absence of the address of the transferor,

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were immaterial where both were known to the directors and there was no doubt as to the identity of the shares intended to be transferred: *Re Letheby* (1909) 1 Ch. 815. The same is true where the wrong numbers are inserted in the transfer: *Ind's Case* (1872) L. R. 7 Ch. 485, or where the numbers are inserted after execution: *Bishop's Case* (1869) L. R. 7 Ch. 269 n., provided always that the identity of the shares transferred is clear.

Form of transfer.

If the transfer is executed in blank there is an implied authority to the transferee to complete it: *Re Goldfields, Limited* (1910) 2 O. W. N. 1373. The absence of a subscribing witness to the transfer has been held not to be fatal, *ibid.* It there is no by-law regulating the form, a transfer in the ordinaary form endorsed on the certificate issued will be sufficient, *ibid.*

Where the company had never delivered the certificate in respect of his shares to the shareholder it was held by MacMahon, J., in *Meyer* v. *Lucknow Elevator Co.* (1905) 6 O. W. R. 291 that an assignment of his stock by the shareholder was a transfer of his certificate in the hands of the company. It was not necessary for the shareholder to go through the formality of obtaining possession of the certificate and handing it to the purchaser.

14. Remedies for refusal to register transfer.

A company owes a duty to a shareholder to permit the transfer of his shares and in case of a wrongful refusal to permit a transfer is liable for the natural consequences of such breach: *Wolverton* v. *Black Diamond Oil Fields* (1915) 8 Alta. L. R. 283.

Suit.

Where a company wrongfully refuses to register a transfer the transferee may sue in equity for a decree compelling the company to register a transfer, but such a decree is not to be made in the face of superior equities, or where there has been laches: *Smith* v. *Bank of Nova Scotia* (1882) 8 S. C. R. 558.

Mandamus.

In Ontario and Quebec mandamus will lie at the instance of a transferee of shares to compel the

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company to make the transfer on its books: *Goodwin* v. *Ottawa and Prescott Ry. Co.* (1862) 22 U. C. R. 186; *Re Guillot & Sandwich and Windsor Gravel Road Co.* (1867) 26 U. C. R. 246; *Re Macdonald & Mail Printing and Publishing Co.* (1876) 6 P. R. 309; *Smith* v. *Canada Car Co.* (1876) 6 P. R. 107; *Crawford* v. *Provincial Insurance Co.* (1859) 8 C. P. 263; *Cunningham* v. *Beaudet* (1878) 11 Q. L. R. 168; *Macdonald* v. *Montreal and New York Ry. Co.* (1856) 6 L. C. R. 232; *Brady* v. *Stewart* (1887) 15 S. C. R. 82; *Upton* v. *Hutchinson* (1899) 2 Que. P. R. 300; R. J. 8 Q. B. 505; *Queen* v. *Clements* (1891) 24 N. S. 64; *Rich* v. *Melanchton Board of Health* (1912) 26 O. L. R. 48.

Mandamus.

Laches will disentitle a transferee from demanding this remedy: *Leadley* v. *Union Stock Yards* (1915) 8 O. W. N. 516.

A distinct refusal to register the transfer is necessary before mandamus will lie, but a refusal in effect though not in direct terms would be sufficient. No rule can be laid down for determining whether there has been a refusal or not: *Re Guillot & Sandwich and Windsor Gravel Road Co.* (1867) 26 U. C. R. 246; *Goodwin* v. *Ottawa and Prescott Ry. Co.* (1863) 13 C. P. 254.

The transferee may also sue for damages for wrongful refusal to register his transfer: *McMurrich* v. *Bondhead Harbour Co.* (1852) 9 U. C. R. 333; *Wolverton* v. *Black Diamond Oil Fields* (1915) 8 Alta. L. R. 283.

Suit.

The writ must be directed against the company and not against the directors or an officer personally: *Cunningham* v. *Beaudet, supra; Queen* v. *Clements, supra; Upton* v. *Hutchinson, supra;* but see *Morton* v. *Cowan* (1894) 25 O. R. 529.

There is no provision in the present Dominion act permitting a summary motion to rectify the register though this remedy is authorized by the acts of a number of the provinces.

Measure of damages for refusal of company to register.

The measure of damages for refusal to register may be the value of the shares at the time of the refusal, see In *re Ottos Kopje Diamond Mines* (1893)

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1 Ch. 618; *McMurrich* v. *Bondhead Harbour Co.* (1859) 9 U. C. R. 333. Where the shareholder is suing, the company is liable for the natural consequences of the breach of duty to permit the transfer, which, in a case where a sale of shares is prevented, is the loss of the sale: *Wolverton* v. *Black Diamond Oil Fields* (1915) 8 Alta. L. R. 283.

15. Sale of shares. Contractual relation of transferor and transferee.

A vendor unless the contract fixes the time for the delivery of the shares must deliver them within a reasonable time, and where unreasonable delay occurs the purchaser may refuse to accept the shares: *De Waal* v. *Adler* (1887) 12 App. Cas. 141. But if the price be payable by instalments the vendor need not transfer till payment in full: *Saunders* v. *Harvey* (1912) Que. 43 S. C. 54. The agreement for sale of shares does not impliedly bind the vendor to procure the registration of the transfer. His duty is performed when he hands over to the transferee the duly executed transfer together with the certificate or its equivalent: *Skinner* v. *City of London* (1885) 14 Q. B. D. 882; *London Founders' Association* (1888) 20 Q. B. D. 576, followed in *Castleman* v. *Waghorn* (1907-8) 7 W. L. R. 412. The transferor, however, is under an implied obligation not to prevent or delay registration of the transfer: *Hooper* v. *Herts* (1906) 1 Ch. 549; *Boultbee* v. *Wills* (1911) 15 O. L. R. 227.

In jurisdictions where a government transfer tax is payable by the transferor, he must affix the revenue stamps or otherwise provide for payment of the tax.

For a case in which the plaintiff in an action for damages for non-delivery of shares failed because the company never became fully organized, see *Roche* v. *Johnson* (1916) 53 S. C. R. 18 reversing (1915) 24 D. L. R. 305.

On the sale of shares where the certificate did not state that the shares were fully paid and in fact there still remained a liability of sixty per cent. thereon, the transferee was held entitled to compel his transferor

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to pay up the balance of sixty per cent. on the company refusing to register him as the holder of fully paid shares: *Beauchemin* v. *Richelieu* (1908) Q. R. 34 S. C. 261, *sed quære* in Ontario.

Sale of shares.

Specific performance of an agreement to sell shares may be granted, and the company may be joined as a proper party: *Reardon* v. *Franklin* (1917) 35 D. L. R. 380; 51 N. S. R. 161, affirmed (1918) 55 S. C. R. 613.

The appropriate remedy for breach of agreement to transfer is damages, where other shares might have been purchased on the market; the transferee is not entitled to have the transferor declared a trustee of the shares for him: *Bureau* v. *Laurencelle* (1913) 11 D. L. R. 283. This case may seem inconsistent with *Stevenson* v. *Wilson* (1907) Sc. Ct. Sess. 445, where it was held that the company having refused to register the transferee while the latter retained the beneficial interest in the shares, the transferor must take the dividends as trustee for the transferee and pay them over to him, but *Bureau* v. *Laurencelle* was a case of shares which were being dealt with on the stock market and which had an assignable money value and therefore it was a case where the purchaser could be adequately compensated in damages.

Purchaser refusing to accept.

Where a purchaser refuses to accept shares, the vendor can have damages or specific performance: *Helwig* v. *Siemon* (1916) 10 O. W. N. 296; *McGregor* v. *Currie* (1914) 31 O. L. R. 261, affirmed by Privy Council, December 14, 1915; *David* v. *Dow* (1916) 27 D. L. R. 689.

In an action for the price of shares, it has been held in Quebec that it is not a ground for a dilatory exception asking for a stay of the action, that the plaintiff has not tendered the shares either before or with the action: *Abitibi Power* v. *Smart* (1914) 20 D. L. R. 977.

Specific performance of a contract for the purchase of shares will not be decreed where the directors, having the power to do so, refuse to assent to the transfer,

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so that the transferee named cannot be put on the register, unless it is a case in which the court can and will compel their assent: *Birmingham* v. *Sheridan* (1864) 33 Beav. 660.

Sale of shares.

In Quebec in a case where there was an agreement to transfer shares the company refused to accept a purchaser as transferee, and the vendor thereupon refused to carry out the agreement. The purchaser brought an action for paid-up shares, or their equivalent in cash. It was held that he was only entitled to the shares as they stood, and as the company refused to transfer the agreement was at an end: *O'Brien* v. *Weaver* (1880) 3 L. N. 111.

Sed quære, whether on the question of recovery of damages this decision is not at variance with the jurisprudence of the provinces other than Quebec.

Where the articles of association of a company required that before the sale of certain shares they should first be offered to the board of directors, an objection by an outside purchaser to complete the purchase by reason of non-compliance by the vendor with such article fails if notice that the shares were for sale was given to the individual directors and the latter took no action towards exercising the right to purchase the shares: *Harvey* v. *Mitchell* (1914) 20 D. L. R. 134.

Measure of damages.

The measure of damages for breach of the obligation of the transferor not to prevent or delay registration was held in *Hooper* v. *Herts* (1906) 1 Ch. 549 to be the difference between the price at which the purchaser had contracted to resell and the price he afterwards obtained when registered as owner. When the number of shares in question is large it may not be possible to fix the damages absolutely as the difference between the value of the shares at the proper time of registration and their value when the transferee finally got control of them; other considerations may be involved such as the state of the market, the nature of the shares &c., as to which see *Hooper* v. *Herts*, *supra* at p. 562.

In a contract for the sale of shares the measure of damages for breach by reason of failure of the seller to deliver or failure of the buyer to take the shares is the difference between the contract price and the market price at the date of the breach: *Rodocanachi Sons & Co.* v. *Milburn* (1886) 18 Q. B. D. 67; *Jamal* v. *Moolla Dawood Sons & Co.* (1916) 85 L. J. P. C. 29. As to the basis on which damages for non-delivery will be assessed where there is no evidence available of the company's shares having a market value, see *Johnson* v. *Roche* (1915) 24 D. L. R. 305, reversed on other grounds (1916) 53 S. C. R. 18.

On default by the purchaser there is an obligation by the vendor to minimize the damages by getting the best price he can at the date of the breach. He is not bound, however, to reduce the damages by subsequent sales at better prices. If the vendor chooses to retain the shares after the breach he is not liable to the purchaser for profits if the market rises and he can not make the purchaser account for subsequent losses if the market falls, *ibid.*

Upon a sale of shares there is an implied contract on the part of the buyer to indemnify the seller from any calls or liabilities which may arise in respect of the shares subsequently to the transfer; *Kellock* v. *Enthoven* (1874) L. R. 9 Q. B. 241; *Levi* v. *Ayers* (1878) 3 App. Cas. 842.

Sale of majority of issued shares.

It is a common transaction for the holders of the majority of the issued shares of a company to sell their shares to a purchaser who desires to obtain the controlling interest in the company. In such cases it would be prudent, where possible, to obtain on the transfer a general release from the purchaser of all claims against the existing directors, where any of these are transferors. See *Ammonia Soda Co.* v. *Chamberlain* (1918) 87 L. J. Ch. 193; (1918) 1 Ch. 266.

16. Conflicting claims to shares before registration.

If notice of an objection on the part of the transferor to registration of the transferee comes to the

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knowledge of the company, the directors are not bound to register the transfer forthwith, even though the transfer is in order: *Ireland* v. *Hart* (1902) 1 Ch. 552. The directors are entitled to a reasonable time to make enquiries, *ibid.* What is a reasonable time, is of course a question of fact. In *Nelles* v. *Windsor Essex and Lake Shore &c. Ry.* (1908) 16 O. L. R. 359 Britton, J., thought that two or three days was a sufficient time and on the application of the transferee made an interlocutory order directing a mandamus to issue. The Divisional Court however set the order aside, holding that there was not sufficient urgency shown as to call for summary action, and that the question of unreasonable delay could be better disposed of on *viva voce* evidence at the trial. While, then, mandamus may not be obtainable on an interlocutory motion, mandamus is the proper remedy where the directors refuse to register the transfer: *Re Polson Iron Works* (1912), 3 O. W. N. 1269 at p. 1271.

In the event of conflicting claims being set up to the shares by the transferor and transferee before registration and an action being brought the company should interplead: *Re Underfeed Stoker Co., of America* (1901) 1 O. L. R. 42.

A special procedure is provided for by s. 101 of the act for determining the ownership of shares in certain cases but this section does not apply to ordinary transfers of shares.

17. Shares held in trust—Rights of transferees.

Questions may arise as to the right of a transferee of shares from a trustee, to hold them against the *cestui que trust.* If the certificate shows on its face that the shares are held in trust the transferee is put on inquiry and is affected with notice that the transferor is not the owner of the shares: *Birkbeck Loan* v. *Johnston* (1901) 3 O. L. R. 497, 6 O. L. R. 258; *London & Canadian Loan and Agency Co.* v. *Duggan* (1893) A. C. 506, at p. 509. If, however, the trust is not clearly disclosed on the face of the certificate, the transferee is

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not in the absence of actual knowledge affected by the trust. Thus in *London & Canadian Loan and Agency Co.* v. *Duggan, supra,* where the certificate was made out to the "manager in trust" of a bank, that indicated merely that he held the shares in trust for his employers, and did not indicate a trust in favor of some third person so as to affect a transferee with notice of such relationship. Where a certificate is endorsed in blank, the holder improperly depositing the certificate as security for advances, may confer on another a valid title against the owner: *Smith* v. *Rogers* (1899) 30 O. R. 256; but where it is not an ordinary endorsement in blank there may be notice of the restricted use which the holder of the certificate may make of it: *Mathers* v. *Royal Bank* (1913) 29 O. L. R. 141.

Shares held in trust.

18. Loans on the security of shares.

It is a common commercial practice to make loans upon the security of shares and the security may be taken in various ways. The borrower may deposit the shares with the lender endorsed in blank, the lender to retain possession of the certificates until the loan is repaid. As share certificates are not negotiable instruments and the title of the lender is not complete until registration he runs the risk of having his security defeated by the prior registration of a subsequent transfer, see *supra* at p. 315. The lender's security may also become impaired if he has not got himself registered as a shareholder by the fact of the borrowing shareholder being indebted to the company; the company may refuse to permit a transfer of the shares into the lender's name, s. 67, or retain dividends on the shares to meet liability for calls or indebtedness, s. 71.

The deposit of share certificates to secure a loan amounts to an agreement to transfer the shares by way of mortgage. The depositee is entitled to a decree of foreclosure and is not restricted to a remedy by sale: *Harrold* v. *Plenty* (1901) 2 Ch. 314.

Transfer 'in trust.'

The practice of taking and registering a transfer of shares to the lender "in trust" is likewise dangerous.

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Loans on security of shares.

The lender should follow one of two courses. If the shares are not paid up he should take a charge, and give notice to the company; if the shares are fully paid he should take a transfer: *Wilson* v. *British Columbia Refining Co.* (1912) 22 D. L. R. 634, 638. If the company registers the transfer to the lenders of fully paid shares, it loses its lien for any indebtedness of the prior shareholders: *ibid.*, at p. 643 and cases cited.

By taking an out and out transfer to himself or his nominee followed by registration the lender obtains absolute title to the shares to the extent of his advances. Where this was done and the lender acted in good faith, taking a transfer from brokers who were fraudulently pledging the shares of their client to secure their own account the lender was entitled to hold the shares as against the brokers' client: *Fuller* v. *Glyn Mills, Currie & Co.* (1914) 2 K. B. 168. In that case it was also held that the lender was not put on enquiry by the mere fact of the brokers' depositing the shares to secure their own indebtedness, nor by the fact that the shares deposited were made out in the name of another party and by him endorsed in blank. If the endorsement is restricted or not "in order" and indicates that only a portion of the shares represented by the certificate are to be used and that the shares are to be sold and not pledged, the lender will be affected with notice and can not retain the certificate: *Mathers* v. *Royal Bank of Canada* (1913) 29 O. L. R. 141. There is no custom or usage of banks or brokers or of the stock exchange justifying the deletion of such restrictive words, *ibid.*

Where a mortgagee of shares has agreed to vote the shares in accordance with the wishes of the mortgagor the Court will enforce such an agreement by mandatory injunction: *Puddephat* v. *Leith* (1916) 85 L. J. Ch. 185.

Lender's power of sale.

Even in the absence of an express power of sale the mortgagee of shares has an implied power to sell on default of payment at the appointed time, or, if no time be fixed, then on the expiration of a reasonable notice

claiming payment on a certain date: *Deverges* v. *Sandeman* (1902) 1 Ch. 579. A month's notice or less would probably be regarded as reasonable, per Stirling and Cozens Hardy, L.JJ., *ibid.* As to the manner in which the sale should take place, that depends on the law of each particular province. In an Ontario case: *Toronto General Trusts* v. *Central Ontario Ry.* (1905) 10 O. L. R. 347, the memorandum of hypothecation authorized the pledgee of bonds, on default, from time to time to sell the securities by giving fifteen days' notice in a daily paper published in Ottawa, with power to buy in and re-sell without being liable for any loss. On the facts it was held that the sale was invalid, and at p. 353 of the report it was said that the sale should be by public auction. Furthermore a sale of securities pledged should be only for a sufficient amount to pay off the debt, *ibid.* In a Quebec case it was held that a public sale duly advertised was necessary, and notice given by private circular to the shareholders was deemed insufficient: *Campbell* v. *Beyer* (1906) Que. 30 S. C. 86. See also *Grice* v. *Bartram* (1912) 3 O. W. N. 1312.

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Loans on security of shares.

If there is a special agreement pledging the shares the rights of the lender and borrower *inter se* will, of course, be governed thereby.

A mortgagee of shares with a power of sale is not a trustee of the power, which is rather a power given him for his own benefit, per Maclennan, J.A., in *Daniels* v. *Noxon* (1889) 17 A. R. 206, at p. 211, citing *Warner* v. *Jacob* (1882) 20 Ch. D. 224. Consequently, there is no duty on him to sue a purchaser of the shares for completion of the sale, and he can not be compelled by the mortgagor to do so except on the terms of the debt being paid, *ibid.*

19. Loan of shares.

Where shares are lent among stockbrokers the borrower is not bound to return the specific shares borrowed, but may repay the loan with any shares of the same amount and kind. In such transactions the

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borrower has the right to return the shares at any time and demand the return to him by the lender of the security given for the loan of the shares. In the event of refusal by the lender to take back the shares the borrower need not make a formal tender thereof: *Wills* v. *Ford and Doucette* (1915) 35 O. L. R. 126 (App. Div.).

20. Transfer practice.

The following are some of the points which commonly arise to be dealt with by the secretary or the transfer officer of the transfer agent and registrar of a company.

(1) *Genuineness of signature.*

The company is bound not to take an existing shareholder off the register unless he has executed a transfer. If it acts on a forged transfer it is liable to the shareholder in damages or may have to go into the market and buy other shares to replace those improperly transferred. The company may as a precaution advise the registered holder of the transfer, but the protection derived from this practice is apt to be illusory: *Sheffield Corporation* v. *Barclay* (1905) A. C. 392, at p. 399. It is a more useful precaution to require the person presenting the transfer to procure the endorsement to be guaranteed by a bank or by a firm of stockbrokers on a recognized stock exchange.

The company is entitled to be indemnified by the person at whose request a forged transfer is registered for any loss resulting therefrom: *Bank of England* v. *Cutler* (1908) 2 K. B. 208; *Sheffield Corporation* v. *Barclay, supra.* In the last mentioned case Lord Davey, at p. 399, stated the liability of the person presenting a transfer for registration as follows: "Where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction or demand of another (it does not seem to me to matter which word you use) and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of duty, and thereby incurs a liability to third

parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty."

The company's duty is towards the shareholder and not towards the person presenting the transfer for registration, *ibid.*

Subsequent transfers following on a void transfer can not be cancelled when the subsequent transferees acquire the shares *bona fide* and are not involved in the fraud, *ibid.*

(2) *Regularity of endorsement.*

The signature should correspond exactly with the name on the face of the certificate. Most forms of endorsement printed on the back of the certificate call for the witnessing of the signature of the transferor, but the absence of a subscribing witness is not fatal: *Re Goldfields and Harris Maxwell* (1910-11) 2 O. W. N. 1373.

(3) *Change of name.*

In the case of the marriage of a female shareholder and consequent change of name, a statutory declaration should be required setting out the facts and showing that the names on the face of the certificate and in the endorsement are those of the same person.

As shares are personal estate and are governed by the law of the shareholder's domicile it is important to obtain the concurrence of the husband in the transfer of shares by a female married shareholder domiciled in a jurisdiction, *e.g.*, the Province of Quebec, where such concurrence may be requisite, or where the domicile of the shareholder is in doubt, to obtain a declaration covering the matter.

(4) *Transfers by executors and administrators.*

Production of the original probate or letters of administration or a duly certified copy should be required, but the company need not examine the will to ascertain whether it confers authority to transfer the

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shares: *Barton* v. *North Staffordshire Railway Co.* (1888) 38 Ch. D. 458. By production of the probate the company acquires notice only of the names and addresses of the executors and is not entitled to assume that a transfer by the executors involves a breach of trust: *Grundy* v. *Briggs* (1910) 1 Ch. 444. The company is entitled to rely on s. 68 of the Act.

If there is more than one executor or administrator all should concur in the transfer. Under the Imperial Act of 1908, s. 29, corresponding to s. 68 of the Dominion Act, a transfer by one of two executors not registered as shareholders may be sufficient. But see s. 3 (d) of the Act.

If the company registers a transfer made by a person who is not the executor the true executor will be entitled to have the share register rectified and to recover from the company any dividends which may have been paid to the transferee: *Stuart* v. *Hamilton Jockey Club* (1910) 2 O. W. N. 673, 1402; and where the transfer on the face of it shows that the transferor has no authority to deal with the shares the company may not be able to rely on it in order to make the party propounding the transfer liable as warranting its genuineness. *Ibid.*, at p. 1404.

In the case of transfers by foreign executors or administrators the taking out of ancillary letters probate or ancillary administration, or the re-sealing of the probate or letters of administration in the province where the head office of the company is situated must be exacted: *A. G.* v. *N. Y. Breweries* (1898) 1 Q. B. 205; (1899) A. C. 62. It is furthermore necessary in such cases for the company to require proof of compliance with the provisions of the Succession Duty Act of the province in which the register of the company is situated. In most provinces such acts forbid the registration of transfers by foreign executors unless succession duty has been paid or a bond given to secure payment thereof. If no succession duty is payable the executors or administrators should furnish the company with a letter from the Provincial Treasurer to that effect.

Transfer practice.

Where the head office and works of a Canadian company are in the Province of Ontario the shares have a local *situs* in that province and if ancillary letters of administration have been taken out the legal title to the shares is in the Ontario administrators. It follows that a claim disputing the title of the administrators must be determined by the Ontario Courts: *Re Fenwick* (1915-16) 35 O. L. R. 29.

In the case of banks, the *situs* of shares is in the province where the share registry office at which decedent was registered is established, and not where the head office is situated: *Smith* v. *Provincial Treasurers for Nova Scotia and Quebec* (1919) 58 S. C. R. 570.

In the event of an executor withdrawing his signature to a transfer, without giving any specific reason for so doing, the proper practice was stated by Eve, J., in *Grundy* v. *Briggs* (1910) 1 Ch. 444, at p. 449, to be to notify the executors that "unless within a limited time, and a strictly limited time, he took legal proceedings to prevent the company from proceeding to register the transfer, the company would, at the expiration of the time, register the transfer so lodged with them."

(5) *Transfers to and by partnership firms.*

It has been held under the Imperial Companies (Consolidation) Act, 1908, that a company is not bound to enter the name of a partnership firm on the register of members, on the ground that a partnership is not a "person" (being neither a natural person nor a legal entity) and therefore could not under s. 32 of that Act insist that the register be rectified by entering the names of the partners thereon: *Vagliano Anthracite Collieries, Limited* (1910) 79 L. J. Ch. 769.

Section 5 of the Dominion Act seems to contemplate "persons" as constituting the shareholders, and s. 89, which deals with the books required to be kept by the company, also refers to "persons." Accordingly, it would appear that the Vagliano Case is applicable under our Act. The existing practice, however, is to register partnership firms in the name of the firm, and

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where this is done it is a proper precaution to obtain from the firm, for use when the shares are transferred by it, a specimen signature in the following form:—

" Limited."

Toronto. date.

"We beg to advise you that the members of the firm of authorized to transfer shares and securities standing in the name of the firm, are as below stated, and will sign the firm name as follows:—

Member of firm.	Facsimile of firm signature.
.....	will sign .....
.....	" .....
.....	" .....

But any transfer ought to be signed by each individual partner in his own name unless the business of the partnership is to deal in shares.

Where a firm has been actually registered as a shareholder it has been held that it may be liable as a contributory in a winding-up: *Land Credit Co. of Ireland, Weikersheim & Co.'s Case* (1873) L. R. 8 Ch. 831.

(6) *Custody of certificates after transfer.*

A certificate after transfer should be cancelled and a new certificate issued to the transferee; and if all the shares comprised in the certificate are not transferred a fresh certificate for the balance is issued to the transferor. The company, however, is under no liability to the public at large for the safe custody of certificates for shares in its capital stock, and where a company by mistake returned a certificate, after transfer, to the transferor, whereby the latter was enabled fraudulently to raise money on the security of the shares the person defrauded was held not entitled to recover from the company for the loss sustained: *Langman* v. *Bath Electric Tramways* (1905) 1 Ch. 646.

(7) *Transfers executed under power of attorney.*

Where the transfer is not signed by the shareholder himself but by some one as attorney for him the origi-

nal power of attorney must be left with the transfer and retained by the company. Sects. 64-68A.

(8) *Requirements of registrar and transfer agent.*

Where the company's shares are extensively dealt in or are listed on a stock exchange, a transfer agent and registrar, commonly a trust company, should be appointed to keep the register and record transfers of shares. Transfer practice.

The following is the usual list of requirements of a trust company, in order to enable it to perform its duties as registrar and transfer agent.

1. Certified copy of charter.
2. Certified copy of general working by-laws.
3. Certified copy of minutes of meeting of shareholders at which directors were appointed.
4. Certified copy of minutes of meeting of directors at which officers were appointed.
5. Certified copy of resolution appointing the trust company registrar and transfer agent.
6. Certified list of shareholders (if any).
7. Specimen signatures of officers with power to sign share certificates.
8. Certificates from a solicitor that the company has been duly organized, that it owns certain assets and that the shares issued to date have been properly issued.
9. Corporate seal.
10. In the case of an Ontario company which is subject to Part VIII of The Ontario Companies Act, evidence that the company has obtained a certificate from the Provincial Secretary entitling it to commence business.

Borrowing Powers.

69. If authorized by by-law, sanctioned by a vote of not less than two-thirds in value of the subscribed stock of the company represented at a general meeting duly called for considering the by-law, the directors may from time to time,— Authority.

(*a*) borrow money upon the credit of the company; Borrowing.

(*b*) limit or increase the amount to be borrowed; Amount.

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Issue of bonds.

(c) issue bonds, debentures, debenture stock or other securities of the company, and pledge or sell the same for such sums and at such prices as may be deemed expedient;

Hypothecation.

(d) hypothecate, mortgage or pledge the real or personal property of the company, or both, to secure any such bonds, debentures, debenture stock or other securities, and any money borrowed for the purposes of the company.

Limitation as to bills and notes.

2. Nothing in this section contained shall limit or restrict the borrowing of money by the company on bills of exchange or promissory notes made, drawn, accepted or endorsed by or on behalf of the company.

Perpetual debenture.

3. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

Power to re-issue redeemed debentures in certain cases.

4. Where a company has redeemed any debentures previously issued, the company, unless the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such a re-issue the person entitled to the debentures shall have the same rights and priorities as if the debentures had not previously been issued;

Transfer from nominee of company.

(a) where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the passing of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section;

When debentures deposited not redeemed.

(b) where a company has, either before or after the passing of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited;

Re-issue of debentures.

(c) the re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the passing of this Act, shall not be treated as the

issue of a new debenture for the purposes of any provision limiting the amount or number of debentures to be issued; Sect. 69.

(*d*) nothing in this section shall prejudice,— Pending proceedings not affected.

(i) the operation of any judgment or order of a court of competent jurisdiction pronounced or made not later than ninety days after the passing of this Act as between the parties to the proceedings in which the judgment was pronounced or the order made, and any appeal from any such judgment or order shall be decided as if this Act had not been passed; or,

(ii) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same. 4-5 Geo. V., 1914, c. 23, s. 3.

Information as to Mortgages, Charges, etc.

69A. (1) Every mortgage or charge created after the first day of January, nineteen hundred and eighteen, by a company, and being either,— Registration of mortgages and charges.

(*a*) a mortgage or charge for the purpose of securing any issue of debentures; or,

(*b*) a mortgage or charge on uncalled share capital of the company; or,

(*c*) a floating charge on the undertaking or property of the company;

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with an original of the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the Secretary of State of Canada, for registration in manner required by this Act, within thirty days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured; and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable: Provided that,—

(i) in the case of a mortgage or charge created out of Canada comprising solely property situate outside Canada, the delivery to and the receipt by the Secretary of State of Canada of a copy of the instrument by which the mortgage or charge is created or evidenced, verified in the prescribed manner, shall have the same effect for the purposes of this section as the delivery and receipt of the instrument itself, and thirty days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in Canada, shall be substituted for thirty days

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after the date of the creation of the mortgage or charge, as the time within which the particulars and instrument or copy are to be delivered to the Secretary of State of Canada; and,

(ii) where the mortgage or charge is created in Canada, but comprises property outside Canada, the instrument creating or purporting to create the mortgage or charge may be sent for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and,

(iii) the holding of debentures entitling the holder to a charge on land shall not be deemed to be an interest in land.

(2) The Secretary of State of Canada shall keep, with respect to each company, a register in the prescribed form of all the mortgages and charges created by the company after the first day of January, nineteen hundred and eighteen, and requiring registration under this section, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(3) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled *pari passu,* is created by a company, it shall be sufficient if there are delivered to or received by the Secretary of State of Canada within thirty days after the execution of the deed containing the charge, or, if there is no such deed, after the execution of any debentures of the series, the following particulars:—

(*a*) the total amount secured by the whole series; and,

(*b*) the dates of the resolutions authorizing the issue of the series and the date of the covering deed, if any, by which the security is created or defined; and,

(*c*) a general description of the property charged; and,

(*d*) the names of the trustees, if any, for the debenture holders;

together with the deed containing the charge, or if there is no such deed, one of the debentures of the series; and the Secretary of State of Canada shall, on payment of the prescribed fee, enter those particulars in the register:

Provided that, where more than one issue is made of debentures in the series, there shall be sent to the Secretary of State of Canada for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

(4) Where any commission, allowance, or discount has been paid or made either directly or indirectly by the company

to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration under this section shall include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued: Sect. 69A.

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

(5) The Secretary of State of Canada shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with.

(6) The company shall cause a copy of every certificate of registration given under this section to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this sub-section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

(7) It shall be the duty of the company to send to the Secretary of State of Canada for registration the particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under this section, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the Secretary of State of Canada on the registration.

(8) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee.

(9) Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under this section to be kept at the registered office of the company:

"Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient. *Imp. Act, 1908, s. 93.*

Sect. 69B.

Registration of order appointing receiver.

69B. (1) If any person obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such a receiver or manager under any powers contained in any instrument, he shall within fourteen days from the date of the order or of the appointment under the powers contained in the instrument give notice of the fact to the Secretary of State of Canada, and the Secretary of State of Canada shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

(2) If any person makes default in complying with the requirements of this section he shall be liable on summary conviction to a fine not exceeding twenty dollars for every day during which the default continues. *Imp. Act, 1908, s. 94.*

Filing of accounts of receivers and managers.

69C. (1) Every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall, once in every half year while he remains in possession, and also on ceasing to act as receiver or manager, file with the Secretary of State of Canada an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall also on ceasing to act as receiver or manager file with the Secretary of State of Canada notice to that effect, and the Secretary of State of Canada shall enter the notice in the register of mortgages and charges.

(2) Every receiver or manager who makes default in complying with the provisions of this section shall be liable on summary conviction to a fine not exceeding two hundred dollars. *Imp. Act, 1908, s. 95.*

Rectification of register of mortgages.

69D. The court of the province in which the head office of the company is situated, on being satisfied that the omission to register a mortgage or charge within the time hereinbefore required, or that the omission or misstatement of any particular with respect to any such mortgage or charge, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified. *Imp. Act, 1908, s. 96.*

Entry of satisfaction.

69E. The Secretary of State of Canada may, on evidence being given to his satisfaction that the debt for which any registered mortgage or charge, was given has been paid or

satisfied, order that a memorandum of satisfaction be entered on the register, and shall if required furnish the company with a copy thereof. *Imp. Act, 1908, s. 97.* Sect. 69F.

69F. The Secretary of State of Canada shall keep a chronological index, in the prescribed form and with the prescribed particulars, of the mortgages or charges registered with him under this Act. *Imp. Act, 1908, s. 98.* Index to register of mortgages and charges.

69G. (1) If any company makes default in sending to the Secretary of State of Canada for registration the particulars of any mortgage or charge created by the company, and of the issues of debentures of a series, requiring registration under the foregoing provisions of this Act, then, unless the registration has been effected on the application of some other person, the company, and every director, manager, secretary, or other person who is knowingly a party to the default, shall be guilty of an indictable offence and be liable to a fine not exceeding two hundred dollars for every day during which default continues. Penalties.

(2) Subject as aforesaid, if any company makes default in complying with any of the requirements of this Act as to the registration with the Secretary of State of Canada of any mortgage or charge created by the company, the company and every director, manager, and other officer of the company who knowingly and wilfully authorized or permitted the default shall, without prejudice to any other liability, be liable on summary conviction to a fine not exceeding five hundred dollars.

(3) If any person knowingly and wilfully authorizes or permits the delivery of any debenture or certificate of debenture stock requiring registration with the Secretary of State of Canada under the foregoing provisions of this Act without a copy of the certificate of registration being endorsed upon it, he shall, without prejudice to any other liability, be liable on summary conviction to a fine not exceeding five hundred dollars. *Imp. Act, 1908, s. 99.*

69H. (1) Every company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto. Company's register of mortgages.

(2) If any director, manager, or other officer of the company knowingly and wilfully authorizes or permits the omission of any entry required to be made in pursuance of this section, he shall be liable on summary conviction to a fine not exceeding two hundred dollars. *Imp Act, 1908, s. 100.*

Sect. 69I.

Right to inspect copies of instruments creating mortgages and charges and company's register of mortgages.

69I. (1) The copies of instruments creating any mortgage or charge requiring registration under this Act with the Secretary of State of Canada, and the register of mortgages kept in pursuance of the last foregoing section, shall be open at all reasonable times to the inspection of any creditor or shareholder of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding twenty-five cents for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, any officer of the company refusing inspection, and every director and manager of the company authorizing or knowingly and wilfully permitting the refusal, shall be liable on summary conviction to a fine not exceeding twenty dollars, and a further fine not exceeding ten dollars for every day during which the refusal continues. *Imp. Act, 1908, s. 101.*

Right of debenture holders to inspect the register of debenture-holders and to have copy of trust deed.

69J. (1) Every register of holders of debentures of a company shall, except when closed in accordance with the by-laws of the company during such period or periods (not exceeding in the whole thirty days in any year) as may be specified in the said by-laws, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may by by-law impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of ten cents for every hundred words required to be copied.

(2) A copy of any trust deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request, on payment in the case of a printed trust deed of the sum of twenty-five cents, or such less sum as may be prescribed by by-law of the company, or, where the trust deed has not been printed, on payment of ten cents for every hundred words required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable on summary conviction to a fine not exceeding twenty dollars, and to a further fine not exceeding ten dollars for every day during which the refusal or neglect to forward a copy continues, and every director, manager, secretary, or other officer of the company who knowingly authorizes or permits the refusal shall incur the like penalty. *Imp. Act, 1908, s. 102.*

Payments of certain debts out of assets subject to floating

69K. (1) Where, in the case of a company, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property com-

prised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in winding-up are under the provisions of the *Winding-up Act* relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures. Sect. 69K. Charge in priority to claims under the charge. R. S. c. 144, s. 70.

(2) The period of time mentioned in the said provisions of the *Winding-up Act* shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors. *Imp. Act, 1908, s. 107.*

69L. The provisions of this Act respecting the registration of mortgages, charges or other securities shall be in addition to and not in substitution for the provisions of any statute of any province of Canada or of any foreign country in respect thereto. 7-8 Geo. V., 1917, c. 25, s. 9. Construction of provisions as to registration.

69M. A duly certified copy of any deed, mortgage, hypothec or other authentic instrument executed in the province of Quebec and preserved in the records of a notary public of the province of Quebec, or in the office of a prothonotary of the Superior Court in any district of the said province, shall be deemed to be an original deed, mortgage or instrument for the purposes of this Act, and the term 'mortgage' shall include 'hypothec.' 1918, 8-9 Geo. V., c. 14, s. 1; deemed to have come into force September 20th, 1917. Quebec notarial copies to be deemed originals. 'Mortgage' to include 'hypothec.'

1. Borrowing powers.
   (a) Implied and express.
   (b) The powers conferred by the Act.
2. Procedure for exercising borrowing powers.
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(f) Debenture stock.
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9. Trust Deeds.
(1) Position of, powers and duties of the trustee.
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Borrowing powers.

There are various ways in which a company's power to borrow may be exercised, *e.g.*, by unsecured loan, or overdrawing its bank account which is a form of borrowing: *Cunliffe Brooks & Co.* v. *Blackburn Building Society* (1885) 9 App. Cas. 865, 868; or by means of bills of exchange or promissory notes, the right to borrow on which is not restricted by s. 69. See as to bills of exchange and promissory notes to section 32 of the Act. In this connection it should be observed that the right to issue bearer notes or promissory notes intended to be circulated as money is expressly forbidden by section 5 (2). The more important forms of borrowing, however, are by means of mortgage of the real or personal property of the company, or by the issue of bonds, debentures or debenture stock, all of which are considered in this note.

As borrowing involves the obligation to repay at some time a power to borrow does not authorize the issuing of perpetual or irredeemable debentures: *In re Southern Brazilian Rio Grande del Sul Ry. Co.* (1905) 2 Ch. 78, 82; but the issuing of such debentures is now expressly sanctioned by sub-section 3 of section 69. The giving of a mortgage to secure existing debts is not borrowing: *Barthels* v. *Winnipeg Cigar Co.* (1909) 2 Alta. L. R. 21. It has been held that the power conferred by the section to hypothecate, mortgage or pledge its real and personal property, so far as it conflicts with the law of the Province of Quebec is *ultra*

vires: *Re Dominion Marble Co. in Liquidation* (1917) 35 D. L. R. 63. See now Statutes of Quebec, 1914, 4 Geo. V. c. 51 and *Lord* v. *Canadian Last Block Co.* (1917) 51 Que. S. C. 499. Sects. 69-69M.

1. Borrowing powers.

(a) Implied and express.

Every trading company has an implied power to borrow money for the purposes of its undertaking: *General Auction Estate Co.* v. *Smith* (1891) 3 Ch. 432. A trading company is "one which has been incorporated to carry on any lawful trade or business for the purpose of gain or profit": *Sinclair* v. *Brougham* (1914) A. C. 398; *Bridgewater Cheese Mfg. Co.* v. *Murphy* (1896) 23 A. R. 66, at p. 69, affirmed (1896) 26 S. C. R. 443.

An implied power to borrow, where it exists, is limited in extent to what is reasonably necessary to enable the company to carry on its undertaking. See *Hughes* v. *Northern Electric* (1915) 50 S. C. R. 626, at p. 654. Thus, a rent guarantee company was held to have no implied power to borrow money for the purpose of making loans: *Walmsley* v. *Rent Guarantee Co.* (1881) 29 Gr. 484. A building society in Ontario if authorized by its rules to do so may borrow money for the purposes of the company and may charge or pledge its assets for the payment of the money borrowed: *Re Farmers' Loan Co.* (1899) 30 O. R. 337, but a building society may not carry on a banking business and borrow money from its members on deposit: *Sinclair* v. *Brougham, supra.*

Trading companies.

In regard to a non-trading company, it is settled law in England that there is no power to borrow unless it is conferred expressly or by implication. The powers of a corporation established for certain specific purposes must depend on what those purposes are, and except so far as it has express power given to it, it will have such powers only as are necessary for the purpose of enabling it in a reasonable and proper way

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to discharge the duty or fulfil the purposes for which it was constituted: *The Queen* v. *Sir Charles Reed* (1880) 5 Q. B. D. 483. But corporations lacking express power and not engaged in a business where it would be implied, can, in all cases of need, if in the given course of their business, borrow if not positively forbidden. This is on the assumption that the business which requires aid is the legitimate business of the company: *Walmsley* v. *Rent Guarantee Co.* (1881) 29 Gr. 484.

Semi-public corporations.

With regard to semi-public corporations such as railway companies, and water works companies, it has been laid down as a general rule in England that they can borrow only if they have express authority in their charter. Thus implied power to borrow has been denied to a mining company: *Lowndes* v. *Garnett* (1864) 33 L. J. Ch. 418; an insurance society: *Re Norwich Equitable Fire Insurance Society* (1886) 34 W. R. 206; a railway company: *Re Cork, etc., Railway Co.* (1869) L. R. 4 Ch. 748; a navigation company: *Baroness Wenlock* v. *River Dee Co.* (1885) 10 App. Cas. 354. But see judgment of Strong, C.J., in *Bickford* v. *Grand Junction R. Co.* (1877) 1 S. C. R. 730, 737.

The implied common law power to borrow is excluded by an express power on the principle *expressum facit cessare tacitum*: *Re General Provident Co.* (1869) 38 L. J. Ch. 320.

Limited powers.

When a society or company has upon the face of its constitution, that is, either by the statute or the statutory rules under which it is constituted, only a limited authority to borrow, the person dealing with such society or company must inquire or run the risk: *Chapleo* v. *Brunswick Building Society* (1881) 6 Q. B. D. 715; and where a company is incorporated under a public Act the provisions of which forbid borrowing or buying on credit, no implied authority can arise. And where directors of such a company have purchased goods on credit, they cannot be held liable or made to account for them on any principle: *Struthers* v. *Mackenzie* (1897) 28 O. R. 381. See also *Richardson* v. *Williamson* (1871) L. R. 6 Q. B. 276; and *Cherry* v.

Colonial Bank of Australasia (1869) L. R. 3 P. C. 24, as explained in *Beattie* v. *Lord Ebury* (1872) L. R. 7 Ch. 777, at pp. 795-6; *Weeks* v. *Propert* (1873) L. R. 8 C. P. 427; *West London Commercial Bank* v. *Kitson* (1883) 12 Q. B. D. 157, 13 Q. B. D. 360; *Firbanks' Executors* v. *Humphreys* (1886) 18 Q. B. D. 54; *Elkington & Co.* v. *Hurter* [1892] 2 Ch. 452; *Rashdall* v. *Ford* (1866) L. R. 2 Eq. 750; *Beattie* v. *Lord Ebury* (1874) L. R. 7 H. L. 102.

(b) The powers conferred by the Act.

Section 69 enables the directors if authorized by by-law properly sanctioned by the shareholders to borrow money on the credit of the company. No limitation as to the amount or the purpose of the borrowing is imposed by the Act itself. A limitation might be imposed by the letters patent, in which case if the limit is exceeded *quære* whether such borrowing would be *ultra vires*: *Bonanza Creek Gold Mining Co.* v. *The King* (1916) 1 A. C. 566.

A lender is not bound to enquire into the purposes for which the money borrowed is intended to be applied: *Young* v. *David Payne* (1904) 2 Ch. 608. He should, therefore, refrain from making such enquiry, for if he learns that the object of the loan is unauthorized and then advances his money he can not recover it: *Davis's Case* (1871) 12 Eq. 561. The reciting in a mortgage of a consideration which is illegal, but which is not the real consideration, the latter being the discharge of the company's existing indebtedness and securing financial aid for the future, will not make the mortgage invalid: *Hughes* v. *Northern Electric* (1915) 50 S. C. R. 626. If a director of a company making the loan is also a director of the company which borrows the money his knowledge obtained in the one capacity will not be imputed to the lending company for he owes it no duty to disclose the information: *Young* v. *David Payne & Co., supra.*

A person proposing to lend money to a company incorporated under the Act should satisfy himself on the following points:—

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(1) Whether there is any limit to the company's borrowing powers imposed by the letters patent or supplementary letters patent. If the original documents are not available for inspection, certified copies should be obtained from the department of the Secretary of State.

(2) Whether a by-law authorizing the directors to borrow has been passed and confirmed by the shareholders. A copy of the by-law certified by the president and secretary under the seal of the company as being correct and as having been duly passed by the directors and ratified by the shareholders should be obtained. The question of the necessity for the existence of such a by-law for the validity of securities taken by the lender is considered below, but as a matter of sound practice the lender should satisfy himself as above.

(3) Whether the officers who negotiate the loan and who sign the notes, bills, mortgage or whatever security is taken have been duly empowered by resolution of the directors to sign the company's name. It is desirable that the borrowing by-law should authorize the giving of this authority to the officers by resolution of the directors, and a copy of the resolution should be obtained certified under the hands of the president and secretary with the company's seal affixed as having been duly passed at a meeting of the directors regularly convened at which a quorum of the directors was present.

2. Procedure for exercising borrowing powers.

The common practice is for the directors in the organization stage of the company to pass a by-law authorizing generally the borrowing of money by the directors from time to time in such amounts and in such manner as they shall in their discretion think fit. Owing to the doubt raised by *Johnston* v. *Wade* (1908) 17 O. L. R. 372, it is inadvisable that the by-law be passed by the provisional directors.

The by-law should be ratified by the vote of not less than two-thirds in value of the shareholders represented at a general meeting called for considering the

by-law. A majority of two-thirds of the whole body of shareholders is not required; see *Pacific Coast Coal Mines* v. *Arbuthnot* (1916) 31 D. L. R. 378, at p. 379. The notice of meeting should specify the nature of the by-law to be considered thereat. "Two-thirds in value of the shareholders" means that the votes are to be computed according to the face value of the shares and not according to the amount paid: *Purdom* v. *Ontario Loan* (1892) 22 O. R. 597. The authorization to borrow should be general as it is obviously impracticable for each specific borrowing to be separately authorized by the shareholders; such a by-law is sufficient authorization for the hypothecation of the company's securities to secure the present and future indebtedness of the company: *Standard Bank* v. *Stephens* (1908) 16 O. L. R. 115.

It is desirable that the signing authority of the officers pursuant to the borrowing by-law should be conferred by resolution of the directors. The reason is that the officers who sign on behalf of the company may be changed or be absent when signatures are required, and in such event a new resolution can be readily passed by the directors.

3. Interference with powers of directors to borrow.

When borrowing powers have been vested in the directors by a by-law regularly passed, the exercise of those powers can not subsequently be controlled by a mere resolution of the shareholders: *Cann* v. *Eakins* (1890-1) 23 N. S. R. 475; *Colonist Printing and Publishing Co.* v. *Dunsmuir* (1902) 32 S. C. R. 679, 9 B. C. R. 290. Nor will the Court control the terms and conditions of a loan on the application of a shareholder where they are not clearly illegal: *Farrell* v. *Caribou Gold Mining Co.* (1897) 30 N. S. R. 199.

4. What security may be given.

The directors are authorized by subsection (d) of section 69 to "hypothecate, mortgage or pledge the real or personal property of the company, or both" to secure the bonds, debentures or other securities men-

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What security may be given.

tioned in subsection (c) and any money borrowed for the purposes of the company. The words "for the purposes of the company" are, doubtless, mere surplusage, cf., the remarks of Buckley, J., in *Young* v. *David Payne & Co.* (1904) 2 Ch. 608, at p. 612.

A mortgage of "all property, real and personal that shall hereafter be acquired by the company" includes book debts: *Re Perth Flax and Cordage Co.* (1909) 13 O. W. R. 1140. Where future choses in action are mortgaged and the description is sufficient to permit their identification, then the beneficial interest therein vests immediately on their coming into existence. And it was held in the foregoing case that the omission of the mortgagee to give the debtors notice of the assignment would not, as against the liquidator of the company, defeat the rights of the mortgagee.

Uncalled capital can not be mortgaged under the section, for it is more in the nature of a power than a right; see *Bank of South Australia* v. *Abrahams* (1875) L. R. 6 P. C. 265; *Colonial Trusts Corporation* (1880) 15 Ch. D. 465; *Sankey Brook Coal Co., No.* 2 (1871) 10 Eq. 381; *Re Streatham Estates Co.* (1897) 1 Ch. 15; *Johnson* v. *Russian Spratt's Patent* (1898) 2 Ch. 149.

But a mortgage of arrears of a call already made is valid under a general power to mortgage, and so also a mortgage of the proceeds of a call not yet made but already determined on: *Humber Iron Works Co.* (1868) 16 W. R. 474, 667; *Sankey Brook Coal Co.* (1870) L. R. 9 Eq. 721.

A debenture which changes the undertaking of the company, and "all the property to which it now is, or shall at any time hereafter become entitled, and all estate, right, title and interest of the company in, to and upon the said premises" does not constitute a charge upon the uncalled capital of the company: *Johnson* v. *Russian Spratts Patent* [1898] 2 Ch. 149.

The right to be a corporation is not, of course, susceptible of alienation by mortgage or otherwise, but it is not easy to find any conclusive reasons why other

powers, such as taking lands, operating the railway, taking tolls and exercising the other rights and powers usually conferred upon railway companies, should not be susceptible of transfer, the transferee, of course, being subject to all trusts and burdens in favour of the public which the original company was liable to: *Bickford* v. *Grand Junction R. Co.* (1877) 1 S. C. R. p. 738.

What security may be given.

When a harbour company had power to mortgage its harbour and tolls to a limited amount, and a mortgage made by it was foreclosed and the mortgagee entered into possession, and his lessee brought an action for tolls, it was held that he had no right to act as the corporation and sue in his own name for the corporate tolls: *Whiteside* v. *Bellchamber* (1872) 22 C. P. 241. The general rule is that a franchise is personal to the grantee.

And an execution creditor of a railway company cannot exercise the powers conferred by the Act of incorporation: *Peloe* v. *Welland Ry. Co.* (1862) 9 Gr. 455.

Foreign assets.

In regard to property situate in a foreign country or out of the jurisdiction of the Courts, it is well settled law that the company can make a valid charge of such property without regard to the formalities imposed by the *lex loci*. This is on the principle of *Penn* v. *Lord Baltimore* (1850) 1 Ves. Sr. 444.

Equity Acts *in personam* and where the company giving the charge is within the jurisdiction, it will be enforced: *Mercantile, etc., Co.* v. *River Plate Co.* [1892] 2 Ch. 303; *Hicks* v. *Powell* (1874) L. R. 4 Ch. 741; *Ex p. Holthausen*, L. R. 9 Ch. 722; *Coote* v. *Jecks* (1872) L. R. 13 Eq. 597. But where the foreign law does not recognize the charge as a valid one the debenture holders will not be entitled to prevent an unsecured creditor from realizing against a foreign asset: *Re Maudslay, Sons & Field* [1900] 1 Ch. 602; *Liverpool Marine Credit Co.* v. *Hunter* (1867) L. R. 4 Eq. 62, 3 Ch. 479; *Norton* v. *Florence Land and Public Works Co.* (1877) 7 Ch. D. 332; and this doctrine applies not only to immovable property or to movable property having actual

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locality, but to a foreign debt which has a *quasi* locality and must be treated as being situate in the foreign country: *Re Maudslay, Sons & Field* [1900] 1 Ch. 602.

As to whether a general charge of all the property of the company includes the company's books, see *Engel* v. *South Metropolitan Co.* [1892] 1 Ch. 442; *Clyne Tin Plate Co.* (1882) 47 L. T. 439.

5. Necessity for by-law—irregularities.

How far is it a condition precedent to the right of the directors to borrow that the by-law mentioned in the section be passed? The question involves difficulties but some points appear to be fairly clear.

(1) The directors are agents of the company.

The general powers conferred on them by ss. 80 and 69 are *for the purposes of borrowing* limited by the provisions of this section, and it is a condition precedent to the exercise by them *as agents* of the company of the power to borrow that the prescribed by-law be passed. Until the by-law has been passed they are not vested with the power to borrow.

(2) From this it follows that a shareholder could, until the by-law had been passed and sanctioned, enjoin them from borrowing because the proposed act is under these circumstances *ultra vires* in the secondary sense.

Supposing the lender has loaned and as part of the transaction has taken securities of the company for repayment, but the prescribed by-law has not been passed, and the lender made no inquiries and had no notice of the omission, what are his remedies?

While section 69 provides that if the directors have been authorized by by-law duly ratified by the shareholders they shall have power to borrow, the acts of the directors in case they purport to borrow without such authorization are irregular only and may be ratified subsequently by the requisite majority of the shareholders: *Adams* v. *Bank of Montreal* (1899) 8 B. C. R. 314; affirmed (1901) 32 S. C. R. 719. The section is directory and not imperative. Where an act is capable of being validly done with the approval of a

majority, then the majority alone can complain if such approval has not been obtained, and the action must be brought in the name of the company: *Macdougall* v. *Gardiner* (1876) 1 Ch. D. 13; *Burland* v. *Earle* (1902) A. C. 83; *Dominion Cotton Mills* v. *Amyot* (1912) A. C. 546. A minority of the shareholders has no *locus standi*.

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Necessity for by-law—irregularities.

Where a by-law has been passed and approved at a meeting of shareholders which is not a special meeting, and a large majority of the shareholders have voted in favor of the security given, *semble*, per Street, J., in *Trusts and Guarantee* v. *Abbott Mitchell* (1906) 11 O. L. R. 403, that is a sufficient compliance with the Act.

What is the position of the lender who has made an advance without informing himself as to the existence of a by-law authorizing the borrowing, where no by-law in fact exists or where it has not been authorized by the requisite majority of shareholders at a meeting properly convened and where the security taken is attacked by the company itself or by a liquidator?

Application of rule of *Royal British Bank* v. *Turquand*.

Persons dealing with a company will be fixed with notice of everything contained in the Act under which the company is incorporated and they may be further taken to have knowledge of the contents of the letters patent which are accessible by search in the proper office, but further than that they need not go, per Killam, J., in *McEdwards* v. *Ogilvie Milling Co.* (1887) 4 Man. R. 1, at p. 6; *Montgomery* v. *Mitchell* (1908) 7 W. L. R. 518, at p. 524; *Sheppard* v. *Bonanza* (1894) 25 O. R. 305. See also *Thompson* v. *Brantford Electric* (1895) 25 A. R. 340; *Merchants Bank* v. *Hancock* (1884) 6 O. R. 285; *McDougall* v. *Lindsay Paper Mill Co.* (1883) 10 P. R. 247, at p. 252; *Cann* v. *International Trust* (1894) 40 N. S. R. 65; *McKain* v. *Canadian Birkbeck* (1904) 7 O. L. R. 241, 247. See also *Jefferson* v. *Pacific Coast Company Mines, Ltd.* (1916) 31 D. L. R. 557.

A person who *bona fide* takes a security is not bound to enquire into the regularity of the directors' proceed-

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Necessity for by-law—irregularities.

ings leading up to the giving of the security and in this regard a shareholder is in no worse position than a stranger: *Jackson* v. *Cannon* (1903) 10 B. C. R. 73. This is only another application of the rule in *Royal British Bank* v. *Turquand,* and the reason for it is thus stated by Lord Macnaghten in *Montreal and St. Lawrence, &c., Co.* v. *Robert* (1906) A. C. 196, at p. 202, "But the by-laws . . . are not public property. Those who deal with the company have no means of access to them, no right to pry into the company's archives or interrogate its officials." In the last mentioned case the officials of the company had put forward a copy of a resolution which purported to have been regularly passed and the company was held not entitled subsequently to avoid it by showing that it had been passed by an insufficient quorum.

While knowledge of an irregularity in the passing of the by-law would disentitle a lender to the protection of the rule in *Royal British Bank* v. *Turquand,* where the lender and the borrower are companies and one person is an officer of both, his personal knowledge is not necessarily the knowledge of both companies: *Young* v. *David Payne* (1904) 2 Ch. 608.

A lender, then, having taken a security apparently duly executed by the company is entitled to assume that everything necessary to its valid execution has been regularly and properly done and neither the company nor its liquidator, who stands in no better position, can attack the security for irregularity, per Moss, C.J.O., in *Hammond* v. *Bank of Ottawa* (1910) 22 O. L. R. 73, at p. 80. See also *In re Summerside Electric* (1908) 5 E. L. R. 129, where it was sought to invalidate bonds because the by-law authorizing them had not been properly ratified. In *Duck* v. *Tower Galvanizing Co.* (1901) 2 K. B. 314, where no directors of the company had been appointed and no resolution passed a *bona fide* holder for value of debentures obtained priority over an execution creditor. See also *County of Gloucester Bank* v. *Rudry* (1895) 1 Ch. 629; *In re Bank of Syria, Owen & Ashforth's Claim* (1901) 1 Ch. 115. See also *Commercial Rubber Co., Ltd.* v. *St. Jerome*

(1908) Q. R. 17 K. B. 275, as to the duty of the company to cure an irregularity of this character.

Necessity for by-law —Irregularities.

An execution creditor can not interfere even where no by-law has been passed and neither the company nor the shareholders have complained of the irregularity: *Merchants' Bank* v. *Hancock* (1884) 6 O. R. 285.

Even where minority shareholders would be entitled to have a mortgage set aside on the ground that it constituted a fraud upon the minority, if bonds issued under the mortgage have got into the hands of third parties neither the bonds nor the mortgage can be set aside: *Cann* v. *International Trust* (1894) 40 N. S. R. 65. In the last mentioned case the objecting shareholders were, however, held entitled to some relief and a reference was ordered to ascertain the value of the property misapplied, and it was further held that a receiver might be appointed and the company wound up.

The Court of Appeal of Ontario differed in the case of *Johnston* v. *Wade* (1908) 17 O. L. R. 372 as to whether the provisional directors of a company had the power to pass a borrowing by-law, but the by-law there in question had been confirmed at the meeting of shareholders at which the provisional directors had been elected permanent directors and it was held to be valid.

Compliance with s. 26.

Question may also arise whether a company has become entitled to exercise any borrowing powers before ten per cent. of its authorized capital had been subscribed and paid for; see the note to s. 26. It is advisable in the case of newly incorporated companies to take a statutory declaration from some responsible officer of the company covering this point.

6. Giving security for existing debts.

There is a distinction between borrowing and giving security for an existing debt. Every trading company has an implied power to do the latter: *Barthels, Shewan & Co.* v. *Winnipeg Cigar Co.* (1909) 2 Alta. L. R.

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21, unless the power be expressly restrained or prohibited by the governing Act: *Long* v. *Hancock* (1885) 12 S. C. R. 532.

When a mortgage was given by a railway company to secure advances by a bank to the contractor, who was building the railway, it was held by the Supreme Court of Canada:

Giving security for existing debts.

First. *Prima facie*, any corporation has power to mortgage its property, and no enabling power is requisite to confer it. But if a company's rights in this respect are limited, it must be by force of some disability in the instrument creating it, whether that instrument be a statute or a royal charter. Further, that such a disability may be deduced, either by the corporation being limited to certain specific objects, or from its property being subject to charges or trusts in favor of the public with which a mortgage would be inconsistent.

Secondly. That the company having the power of doing the actual construction work itself, and of securing the cost by giving a mortgage upon any property which, in other respects, they were free to give as security, were not disabled from mortgaging their property as collateral security in aid of the contractor: *Bickford* v. *Grand Junction R. Co.* (1877) 1 S. C. R. 730.

See also s. 32 of the Dominion Companies Act, which has the effect of rendering the company liable for loans made through its officer, its agent, or servant, acting in general accordance with his powers under the by-laws of the company.

And see generally, *Commercial Bank of Canada* v. *Great Western Railway Co.* (1865) 3 Moore P. C. (N. S.) p. 313; *Waterous Engine Co.* v. *Town of Palmerston* (1892) 21 S. C. R. 556; *Neelon* v. *Thorold* (1893) 22 S. C. R. 390; *MacArthur* v. *Town of Portage la Prairie* (1893) 9 M. R. 588; *Bernardin* v. *North Dufferin* (1891) 19 S. C. R. 581; *Re Rockwood Agricultural Society* (1899) 12 Man. R. 655; *Galt* v. *Erie R. Co.* (1868) 14 Gr. 499; *Lincoln Paper Mills Co.* v. *St. Catharines R. Co.* (1890) 19 O. R. 106.

Giving security for existing debts.

The principle on which such transactions will be held valid is well put in *Stagg* v. *Medway* (1901-2) 50 W. R. 446, where a company having borrowing powers limited to mortgages on its undertaking gave a mortgage of its surplus land in arranging for the transference of an existing debt. Swinfen Eady, J., at p. 447 said, "If the surplus lands of a company are liable to be taken by a creditor obtaining judgment against the company, the company can anticipate that event by making them a security for the debt. On that ground I hold that the transaction proposed is valid. The company are making no fresh loan, but are arranging terms with regard to an antecedent debt."

The distinction between borrowing and giving security for existing debts may be of importance. Thus, for example, in *Trusts and Guarantee Co.* v. *Abbott Mitchell Iron and Steel Co.* (1906) 11 O. L. R. 403, where the directors of a company pledged certain material and assigned book debts to the company's bankers to secure an overdraft without a two-thirds vote of the shareholders as required by s. 49 of the Ontario Companies Act (corresponding to s. 69 of the Dominion Act) the transaction was sustained as being within the general powers of the directors under s. 46 of the Ontario Act (corresponding to the preliminary clause of s. 80 of the Dominion Act). See also *Scott* v. *Colburn* (1858) 26 Beav. 276; *In re Patent File Co.* (1871) L. R. 6 Ch. 83, where a company secured a past debt by the deposit of title deeds.

S. 69 (d).

The fact that subsection (d) of s. 69 confers an express authorization, subject to the restrictions imposed by the section, to give security for any money borrowed for the purposes of the company, raises the question how any implied power to give security for debts incurred can exist alongside of the express power.

The distinction appears to be that if the money is borrowed on the strength of the security the section applies, but not if the debt has *bona fide* arisen without any reluctance in giving or of taking security.

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Pledge of bonds.

The directors are given power under sub-section (c) of section 69 to pledge or sell the bonds of the company "for such sums and at such prices as may be deemed expedient." It is not necessary that the directors should negotiate the bonds for cash. The issue or pledge of bonds to a creditor may be treated as a borrowing under a general borrowing power, and the reason for this is thus stated by Kay, J., in *Howard* v. *Patent Ivory Co.* (1888) 38 Ch. D. 156, at p. 170, "If you might not issue debentures to a creditor under a borrowing power, it would come to this that you would have to issue debentures to the bankers or somebody else, who would advance the money and then pay that over to the creditor, or issue debentures to the creditor himself, he lending you the money first and then you paying it back to him. Of course it is obvious that such a roundabout proceeding as that need not be resorted to and the court looks to the substance of the matter."

Where the Act of incorporation gave the directors power to "issue and sell or pledge all or any of the . . . bonds for the purpose of raising money for the prosecution of the . . . undertaking," it was held that using bonds in the following manner was within the power. The company, a railway, made an agreement with contractors for the construction of part of its road, and deposited bonds to secure payment, and on the railway's default the bonds were delivered to the contractors at the rate of fifty cents on the dollar: *Winnipeg and Hudson's Bay Ry. Co.* v. *Mann* (1890) 7 Man. L. R. 81. See also *Re Inns of Court Hotel Co.* (1868) L. R. 6 Eq. 82, at p. 89; *Landowners West of England, &c., Ry. Co.* v. *Ashford* (1880) 16 Ch. D. 411.

As to the rights of holders of bonds as collateral security where the terms of the issue itself do not authorize the use of the bonds by the company as collateral security for existing indebtedness, see *Re B. C. Portland Cement Co., Ltd.* (1915) 22 D. L. R. 609; (1916) 27 D. L. R. 726.

Where the only real shareholders of a company had paid a part of their own debt to the plaintiff with the

company's money and had obtained the issue to him of shares of the company by way of security, it was held that this was not an assumption of the debt by the company and that the plaintiff did not become a creditor of the company for the balance: *Re Pengelly-Akitt, Ltd.* (1914) 16 D. L. R. 79. Sects. 69-69M.

7. Ultra vires borrowing—relief.

The Act contains no limitation as to the amount which a company may borrow. A limitation might be imposed by the letters patent. A violation of such restriction apparently would not be *ultra vires*, the company being a common law corporation, but would give ground for proceedings by way of *scire facias* for the forfeiture of the charter: *Bonanza Creek, &c. Co.* v. *The King* (1916) 1 A. C. 566. The Courts of Canada have for many years proceeded on the assumption that companies incorporated by letters patent under this and similar provincial acts possess only such powers as are in express terms or by necessary implication conferred on them by their constating instruments (statute and charter), but this doctrine was to a great extent wiped out by the judgment in the case last cited. It must, however, be remembered that the doctrine applies to companies incorporated by special Act under Part II. Part. II. contains no special provisions with regard to borrowing, so that this is a convenient point for the discussion of the doctrine of *ultra vires* as applied to borrowing, considered apart from the *Bonanza Case.*

Where a company borrows in excess of its powers such borrowing will be *ultra vires* and not binding on the company, notwithstanding the assent of the shareholders: *Ashbury Ry.* v. *Riche* (1875) L. R. 7 H. L. 653. A company can not be estopped by deed or otherwise from showing that it had no power to do that which it purports to do: *Ex parte Watson* (1888) 21 Q. B. D. 301, but see *Clarke* v. *Sarnia* (1877) 47 U. C. R. 39. Where a company has borrowed without authority no debt, legal or equitable, is created which the lender can assert against the company unless he can

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claim the benefit of one or other of the following principles:—

Ultra vires borrowing —relief.

(1) Where money borrowed has been used in paying off an existing or future enforceable debt the borrowing is not *ultra vires* for the transaction has not added to the liabilities of the company: *Wrexham Mold and Connah's Ry.* (1899) 1 Ch. 440; *Wenlock* v. *River Dee* (1887) 19 Q. B. D. 155; *Bridgewater Cheese Mfg. Co.* v. *Murphy* (1896) 23 A. R. 66, affirmed 26 S. C. R. 443; *In re Harris Calculating Machine Co.* (1914) 1 Ch. 920; *Royal Bank* v. *B. C. Accident Co.* (1917) 35 D. L. R. 650. In such a case the lender can recover the amount of the loan from the company, but he is not entitled to be subrogated to any securities or priorities of the creditors who are paid off by the moneys advanced: *In re Wrexham, supra.*

(2) If the money borrowed has not been disposed of, or has been used in the acquisition of an asset that can be identified, the lender is entitled to claim the particular money or asset: *Sinclair* v. *Brougham* (1914) A. C. 398.

Remedy against directors.

Where a lender is not able to invoke either of the above principles and is precluded from claiming against the company in respect of an *ultra vires* loan, he may still have a personal remedy against the directors of the company, for the directors may be held liable for money borrowed in excess of the powers of the company if they can be considered as having impliedly warranted their authority to bind the company.

So where advertisements were issued stating that loans might be made to the company by bringing the money to the office of the secretary and these advertisements were issued with the authority of the directors, and moneys were received after the borrowing powers of the company had been exceeded, it was held that the directors were personally liable for the moneys advanced, although there was no fraud on their part: *Chapleo* v. *Brunswick Building Society* (1880) 5 C. P. D. 331; 6 Q. B. D. 696.

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Ultra vires borrowing —relief.

Directors of a railway company advertised that they were prepared to receive proposals for loans on mortgage debentures of the company. The plaintiff applied to lend £500; his application was accepted, and he was informed that when he was ready with his money a debenture would be issued. This was held to amount to a warranty that the directors had power to issue a valid debenture. The company's borrowing power was exhausted at that time and the directors were accordingly personally liable to the plaintiff: *Weeks* v. *Propert* (1873) L. R. 8 C. P. 427.

Remedy against directors.

But directors will not be liable unless the implied representation is one of fact and not of law, so where a company was prohibited by the statute incorporating it from buying goods on credit, it was held that the plaintiff was fixed with knowledge of the statutory disability and could not make the directors liable as their implied warranty of authority was one of law: *Struthers* v. *Mackenzie* (1897) 28 O. R. 381. Accordingly where the limitation on borrowing is contained in the governing act and could be discovered from a perusal thereof the directors can not be made liable. Where, however, the governing act does not show that the particular transaction is *ultra vires, e.g.,* where the company has exceeded the amount which it is entitled to borrow the representation may be one of fact and the directors therefore may become liable.

Measure of damages.

The measure of damage is arrived at by considering the difference in position of the plaintiff as a result of the misrepresentation. Thus if valid debentures of the company would be worthless the damages would be nothing, but if they would be worth one hundred cents on the dollar the value of the genuine debentures is the measure of the loss: *Firbanks* v. *Humphreys* (1886) 18 Q. B. D. 54; see also *Richardson* v. *Williamson* (1870) L. R. 6 Q. B. 276.

The fact that the directors themselves were deceived and did not know that they had no power is immaterial: *Firbanks* v. *Humphreys, supra,* at p. 62.

Ultra vires securities.

A company may sometimes validly contract a debt although securities may be given for the debt which

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Ultra vires borrowing —relief.

are *ultra vires* of the company on account of special provisions with reference to them. So, when a company was prohibited from giving bills of exchange, but had power to mortgage and gave bills of exchange to secure an existing debt accompanied by a mortgage and made conditional on the payment of the bills, it was held that the mortgage was given to secure the debt and not the payment of the bills, and was therefore not invalid on that account: *Scott* v. *Colburn* (1856) 26 Beav. 276. And where a company issued bonds secured by a mortgage which it had no power to make, it was held that the bonds were not vitiated by the *ultra vires* mortgage. And in the case of a municipal corporation prohibited from selling, mortgaging or alienating any of its lands, it was held that while a mortgage given was a nullity so far as the transfer of property under it was concerned, still the covenant was good and valid and binding on the corporation: *Payne* v. *Mayor of Brecon* (1858) 3 H. & N. 572. Where a company has power to borrow, but the directors have only a limited power and exceed it, the borrowing is irregular and the securities inoperative unless the creditor can avail himself of the rule in *Royal British Bank* v. *Turquand, supra.* See *Irvine* v. *Union Bank of Australia* (1877) 2 App. Cas. 366, and *Howard* v. *Patent Ivory Co.* (1888) 38 Ch. D. at p. 170.

8. Bonds and debentures.

(a) Description of the term.

The terms " bonds " and " debentures " are used without any distinction of meaning in this country: *Johnston* v. *Wade* (1908) 17 O. L. R. 372.

Debentures.

" Debenture " is not a strictly technical term, but is applied to a security for money, called on the face of it a debenture, and providing for the payment of a certain specified sum to the owner or bearer with interest in the meantime. It may be applied to any instrument shewing that the party making it owes money and is bound to pay it: *Bank of Toronto* v. *Cobourg, etc., Ry. Co.* (1884) 7 O. R. p. 7.

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Bonds and debentures.

A debenture may be a mere promise to pay or a promise to pay secured by mortgage or charge either in the debenture itself or in a covering trust deed, or by a combination of both. See the observations of Lindley, J., in *British India Steam Navigation Co.* v. *Commissioners of Inland Revenue* (1881) 7 Q. B. D. 165 at p. 172, as to what various classes of instruments are entitled to be described as debentures. A debenture need not be under seal: *Re Fire Proof Doors* (1916) 2 Ch. 142: *Biggerstaff* v. *Rowatt's Wharf* (1896) 2 Ch. 93.

Debentures usually provide for payment at a fixed date, but they may be payable on a certain contingency, such as winding-up, wherein they differ from a promissory note or bill of exchange, which must be payable at a fixed or determinable future time, that is at a fixed time, or at a fixed period after the occurrence of a specified event which is certain to happen. See Bills of Exchange Act, R. S. C. (1906) c. 119, s. 24.

Irredeemable.

Section 69 enables a company incorporated under the act to issue irredeemable debentures. In the absence of such a provision there is no such right, for the issuing of such securities is not a borrowing at all but the sale of a perpetual annuity, *In re Southern Brazilian Rio Grande del Sul Ry Co.* (1905) 2 Ch. 78.

Debentures may be payable to bearer or registered holder, or to bearer with power to register them and make them transferable thereafter (until withdrawn from the register) only on the books of the company. They may also be made payable to the registered holder, but with coupons payable to bearer.

Coupon.

As to the nature of a coupon see *Mackenzie* v. *Montreal and Ottawa* (1877) 27 U. C. C. P. 224. A detached coupon is subject to the covenant contained in the bond: *Levis County Ry.* v. *Fontaine* (1904) Q. R. 13 K. B. 523, where it was held that as the bondholders were precluded by the trust deed from suing in their own name for interest on the bonds and, as the coupons purported to be payable at the office of a named trust company, the holder of the coupons

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could have known of the existence of the trust deed and was bound to assume that it contained the usual conditions.

Bonds.

Debentures are usually payable at a fixed place and must be presented there before payment can be enforced: *McDonald* v. *Great Western Ry. Co.* 21 U. C. R., 223; *Osborne* v. *Preston & Berlin Ry. Co.* 9, U. C. C. P., 241; see also *Becher* v. *Corporation of Amherstburg,* 23 U. C. C. P., 602.

And in an action for damages by way of interest from the date the bonds or debentures are due until they are actually paid, the company may set up by way of defence that the bonds or debentures were not presented at the particular place, *e.g.,* a bank, even if there were no funds in the bank at the time to meet the particular indebtedness: *Montreal City Bank* v. *Corporation of Perth,* 32 U. C. C. P. 18. But, otherwise, if the company were sued by way of debt on the bonds or debentures: *Fallowes* v. *Ottawa Gas. Co.,* 19 U. C. C. P., 174; *Re Thompson & Victoria Ry. Co.,* 9 P. R. 119.

(b) Issuance.

Debentures are not issued until they are delivered: *Mowatt* v. *Castle Steel Co.* (1886) 34 Ch. D. 58. The deposit of an unregistered debenture sealed in blank without name or date is an issue thereof: *Perth Electric Tramways* (1906) 2 Ch. 216.

"Issue" in a less proper sense may signify the preparation, signing and sealing of the documents and the placing them absolutely out of the possession and control of the company, per Killam, J., *West Cumberland Iron Co.* v. *Winnipeg & Hudson's Bay Ry. Co.* (1890) 6 Man. R. 396.

See also *Winnipeg and Hudson's Bay Ry. Co.* v. *Mann* (1890) 7 Man. R. at pp. 93 and 94.

By individuals.

There is nothing to prevent debentures being issued by individuals, nor is it necessary that they should be under seal: *British India &c. Co.* v. *Commissioners of Inland Revenue* (1881) 7 Q. B. D. 165; but in the latter case they should be expressed to be made for valuable

consideration received. A company may give a debenture in payment of an existing or past debt: *Howard* v. *Patent Ivory Co.* (1888) Ch. D. 170. Where a portion of a series of debentures has been issued and a debenture holders' action has been brought the interest on the debentures issued having gone into arrear, the company can still issue more debentures of the same series before a receiver has been appointed, *Re Hubbard* (1898) 68 L. J. Ch. 54.

Debentures may be lawfully issued at a discount: *Anglo Danubian Steam Co.* (1875) L. R. 20 Eq. 339; but it is illegal to issue debentures at a discount with a right of exchange for paid-up shares at par: *Mosely* v. *Koffyfontein* (1904) 2 Ch. 108.

Power to give a bonus of common stock to a subscriber for bonds or preference stock.

In modern flotations the practice has frequently arisen of giving to subscribers for debentures or preference stock, certain shares of common stock as a bonus. This practice is liable to give rise to subsequent difficulties on the part of the holders of this common stock unless the requisite steps are carefully taken.

If the subscriber is an original subscriber for the bonds, debentures or preference stock and at the same time subscribes for the common stock and such common stock has at the time of his subscription not been issued, but is standing as unissued stock in the books of the company, then the strong probability would be that in a winding-up proceeding, he, as the holder of common stock, would be placed on the list of contributories and made liable to pay 100 cents on the dollar on the common stock which he had got as a bonus: *In re Railway Time Tables* (1894) 62 L. J. Ch. 935.

In order to avoid this difficulty it is necessary that the common stock should first be allotted and issued fully paid-up to one of the promoters and should actually be paid for by him at 100 cents on the dollar either in cash or by the transfer of property. If paid for in cash there is no power on the part of the company to sell it for less than 100 cents on the dollar.

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If paid for in property the transaction cannot be questioned unless grounds are shewn which warrant its being set aside for fraud. Then, when the promoter has thus acquired the common stock fully paid, he may deal with it as he sees fit and present any portion of it as a bonus to the subscribers for bonds, debentures or preference stock.

Bonds.

See also *Dorchester* v. *King* (1915) 24 D. L. R. 373.

Irregularity in issuance.

Bonds must be issued in accordance with the provisions of the by-laws, and subject also to the provisions, if any, of the charter of the company. If they are irregularly issued the same considerations apply as have been discussed above with regard to the exercise of the company's borrowing powers, see p. 366. A *bona fide* holder for value without notice of the irregularity is protected: *Duck* v. *Tower Galvanizing Co.* (1901) 2 K. B. 314; *Re Fire Proof Doors Ltd.* (1916) 2 Ch. 142; 85 L. J. Ch. 444; but if he has notice he will not be protected, *Davis's Case* (1870) 12 Eq. 576. In the absence of holding out a company would not be estopped by a forged bond: *Ruben* v. *Great Fingall* (1906) A. C. 439.

Irregular and insufficient debentures for which a lender has *bona fide* advanced money may be evidence of an agreement on the part of the company to issue valid debentures, so that the holder may have a good equitable debenture on the principle laid down in *Strand Music Hall Co.* (1865) 3 De G. & S. 147, where Lord Justice Turner said, "I apprehend, however, that where the court is satisfied that it was intended to create a charge, and that the parties who intended to create it had power to do so, it will give effect to that intention, notwithstanding any mistake which may have occurred in the attempt to effect it.' See also *Re Fire Proof Doors* (1916) 2 Ch. 142; 85 L. J. Ch. 444, where the debentures had been irregularly sealed.

Agreement to issue.

An agreement for consideration to issue debentures charging property constitutes a present charge of such property and the proposed debenture holder is thereby protected against an execution creditor who intervenes before the debentures are actually issued:

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Simultaneous Colour Printing Co. v. *Fowcraker* (1901) 1 K. B. 771; but in view of the provisions of the acts in the various provinces relating to the registration of deeds and of chattel mortgages the principle stated in the above case is of little practical assistance. So also if a winding-up occurs before the debentures are issued the lender will be secured: *Tailby* v. *Official Receiver* (1888) 13 App. Cas. 523; *Re Hampshire Land Co.* (1896) 2 Ch. 743; *Pegge* v. *Neath District Tramways Co.* (1898) 1 Ch. 183; *New Durham Salt Co.* (1890) 7 T. L. R. 13; *Mercantile Investment Co.* v. *River Plate Co.* (1892) 2 Ch. 303. But see *Re Hansard Publishing Union* (1892) 8 T. L. R. 280.

Option to call for.

An option to call at any time for a specific amount of the mortgage debentures of a given issue in satisfaction of a debt is a good equitable security while the issue remains unexhausted and may be exercised after judgment in a debenture holders' action: *Pegge* v. *Neath District Tramways Co.* (1898) 1 Ch. 183.

Prospectus.

Bonds are frequently offered to the public by prospectus. For a discussion of the law relating to prospectuses see the note to s. 43, which applies to bonds as well as shares. If there is a dispute as to the meaning of certain provisions in bonds the prospectus or the application may not be looked at to ascertain it: *Tewkesbury Gas Co.* (1911) 2 Ch. 279, (1912) 1 Ch. 1. The rights, if any, of the purchaser of such bonds must be asserted by way of a claim for rectification of the bonds, per Parker, J., *ibid.* at p. 283.

Series of bonds.

Where bonds are secured by trust deed creating a charge or where the bonds themselves contain a charge it is usual to insert a provision that all bonds of the issue shall rank *pari passu*. Where this is not done and bonds are issued one after another in numerical order each bond ranks in priority of charge ahead of all the others subsequently issued: *Gartside* v. *Silkstone* (1882) 21 Ch. D. 762.

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When a company has issued a series of debentures, limited to a certain number, to rank *pari passu,* it can not subsequently issue debentures to rank with the first series unless such power has been expressly reserved: *Re Hubbard & Co.* (1898) 68 L. J. Ch. 54. This general rule is subject, however, to the qualification that a company under certain circumstances may create a specific charge in priority to an earlier floating charge, so that bonds of a later issue secured by specific charge may have precedence over bonds of an earlier issue containing a floating charge only. The point is further dealt with below under the heading "Floating Charge."

(c) Bearer bonds and registered bonds.

It was formerly a moot point whether debentures payable to bearer were negotiable or whether they were simply choses in action and only assignable subject to all equities between the company and the original subscriber: See *Athenæum, etc., Society* v. *Pooley,* 1 Giff. 102; (1858) 3 DeG. & J. 294; *Crouch* v. *Credit Foncier* (1873) L. R. 8 Q. B. 374, in which cases it was held that as the instruments were of recent introduction it could have been no part of the law merchant that they should be negotiable. See also *Geddes* v. *Toronto St. Ry. Co.* (1864) 14 C. P. 513; *Trust & Loan* v. *Hamilton* (1858) 7 C. P. 98; *Gott* v. *Gott* (1862) 9 Gr. 165. This view, however, was stated by Cockburn, C. J., in *Goodwin* v. *Robarts* (1875) L. R. 10 Ex. 337, to have been founded on the view that the law merchant is fixed and stereotyped and incapable of being expanded and enlarged, whereas a great deal of it is neither more nor less than the usages of merchants which, on being proved to the Courts, have been adopted by them as settled law, and see *Young* v. *McNider* (1895) 25 S. C. R. 272; *Parish of St. Cesaire* v. *McFarlane* (1887) 14 S. C. R. 738; *Eastern Townships Bank* v. *Municipality of Compton* (1871) 7 R. L. 446; *Jones* v. *Municipality of Albert* (1881) 21 N. B. 200. This view was adopted in England where a usage was proved in the mercantile world and on the Stock Exchange, to treat debentures payable to bearer as nego-

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tiable. See *Bechuanaland Exploration Co.* v. *London Trading Bank, Ltd.* (1898) 2 Q. B. 658. There the secretary of the plaintiff company fraudulently took debentures from the safe and pledged them to the defendants for advances, and it was held the defendants were entitled to hold them on the ground that they were negotiable instruments transferable by delivery.

Bearer bonds and registered bonds.

Where debentures are intended to pass by delivery, or to be negotiable, it is advisable to insert a clause that the principal monies and interest will be paid without regard to any equities between the company and the original or any intervening holder of the debentures, otherwise investors would have difficulty in dealing with a security which might be rendered valueless in their hands by the intervention of some latent equity. See *Mangles* v. *Dixon* (1852) 3 H. L. C. 702; *Athenæum Society* v. *Pooley* (1858) 3 DeG. & J. 294; *Re Agra, etc., Bank* (1867) L. R. 2 Ch. 397; *Re Blakely Ordinance Co.* (1867) L. R. 3 Ch. 154.

Describing bonds as "bearer bonds," where they are stated on their face to be subject to the provisions of the trust deed securing them, an examination of which would have disclosed irregularities, does not make them negotiable to the extent that being termed first mortgage bonds they obtain a priority over any previous issue; *Re B. C. Portland Cement Co.* (1915) 31 W. L. R. 398.

As to the validity of a debenture not made payable to any particular named individual or company, see *Geddes* v. *Toronto Street Ry. Co.* (1864) 14 C. P. 513.

In the case of bearer debentures if it is desired to render them no longer negotiable it may be provided that payment will be made "to the bearer, or if registered to the registered holder from time to time." And it may also be provided that after registration the registered holder may have a transfer to bearer registered and in such case the debenture again becomes negotiable.

A company will be bound to register as owner a person presenting a bearer bond for registration with-

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out production of any transfer: *Re Osler & Toronto Grey and Bruce Ry.* (1881) 8 P. R. 506.

Bonds.

The main reason for having a debenture payable to the registered holder is that the company may have some specific person whose receipts for principal and interest will be an absolute discharge, and make it unnecessary for the company to take notice of alleged assignments, etc.

(d) Transfer of bonds.

Bonds which are not transferable by delivery, are transferred in the same way as shares, and it is usual for the conditions indorsed on the bonds to prescribe the requisite formalities for this purpose. Where bonds contain a charge on land they create an interest in land and an agreement for sale of such a bond must be in writing: *McKinnon* v. *Doran* (1915) 34 O. L. R. 403; (1915-6) 35 L. R. 349; (1916) 53 S. C. R. 609; but see now 69A, ss. 1, an amendment passed in 1917, which declares that the holding of debentures entitling the holder to a charge on land shall not be deemed to be an interest in land.

Bonds are choses in action and the general rule is that the transferee of a chose in action stands in no better position that his transferor; *In re Rhodesia Goldfields Limited* (1910) 1 Ch. 239, and see *Goy & Co. Farmer* v. *Goy* (1900) 2 Ch. 149 at p. 153. As the effect of this rule would be most prejudicial to an innocent purchaser of bonds acquiring them without knowledge of cross claims or equities of the company against his transferor, it is important that the bonds should be transferable free from any equities. Such a provision operates effectively notwithstanding that a winding-up has occurred or a judgment has been obtained in a debenture holders' action: *Goy & Co., Farmer* v. *Goy* (1900) 2 Ch. 149. It was held, however, in *Palmer's Decoration and Furnishing Co.* (1904) 2 Ch. 743, that the company could assert equities against an unregistered transferee. The debentures there in question contained the usual condition that " the prin-

cipal moneys and interest hereby secured will be paid without any regard to any equities between the company and the original or any intermediate holders" of the bond "and the receipt of the registered holder for such principal moneys or interest shall be a good discharge to the company therefor." Buckley, J., said that the condition contemplated only equities as against a *registered* holder and did not protect a transferee who had not got himself registered. He said however, that it was possible to frame a bond which would give an unregistered transferee protection, and Palmer suggests at p. 292 of Company Law, 10th ed., the insertion after the words " will be paid " in the foregoing from the words "and such moneys are to be transferable free from and." See also *Brown* v. *Gregory* (1904) 1 Ch. 627, affirmed (1904) 2 Ch. 447, where the transferee under the circumstances was held not to be in the position of a *bona fide* purchaser for value.

(e) Contract to purchase bonds.

An agreement to take bonds of a company is equivalent to an agreement to loan money and will not be enforced by decree of specific performance: *Dorchester Electric Co.* v. *King* (1915) 24 D. L. R. 373, 48 Que. S. C. 471; *South African Territories* v. *Wallington* (1908) A. C. 309. The remedy against a defaulting purchaser is in damages; *McKinnon* v. *Doran* (1915) 34 O. L. R. 403; 35 O. L. R. 349; (1916) 53 S.C.R. 609, and the measure of damages is the actual loss sustained, measured by the price which is afterwards obtained for the bonds, which is the best price obtainable having regard to the condition of the market, *ibid.* See also *McNeill* v. *Fultz* (1906) 38 S. C. R. 198. In that case the plaintiffs transferred assets to the defendant, the defendant to give the plaintiffs their proportionate share of whatever bonds and securities of a proposed company he might obtain on the sale of those and other assets to the company. In order to carry out his scheme the defendant was obliged to borrow money on the terms of his giving the lender a

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bonus out of the bonds and securities he was to receive on the transfer of the properties to the new company. The defendant deducted from the bonds handed over to the plaintiffs a rateable contribution towards this bonus. It was held that the defendant was not entitled to make such a deduction and the judgment of the court below was sustained holding the defendant liable for the cash value of the bonds and shares unaccounted for calculated on their selling value at the time of default. Duff, J., delivering the judgment of the court said, that if the defendant was to be considered as a trustee wrongfully withholding the bonds, the measure of damages was to be calculated on the assumption that they would have been disposed of at the best price obtainable; if he was a contractor who had failed to deliver securities, the measure of damages was the selling price at the date of the breach. See also *Nant-Y-Glo & Blaina &c. Co.* v. *Grove* (1878) 12 Ch. D. 738, at p. 750. Where a resale of the bonds is contemplated the measure of damages may be the loss of the sale.

In England the hardship arising from the rule that a contract to purchase bonds is not specifically enforceable has been removed by statute, s. 105 of the Imperial Companies (Consolidation) Act, 1908, and the same is true under the British Columbia Companies Act R. S. B. C. c. 39 s. 113.

Bonds secured by a charge of the company's lands which gives a power, on default, of sale of the mortgaged property are an interest in land within s. 4 of the Statute of Frauds and contracts relating to such bonds must be in writing: *Driver* v. *Broad* (1893) 1 Q. B. 539; *McKinnon* v. *Doran, supra.* But see now s. 69A, (1) (iii.).

It is not uncommon for a company to offer a bonus of its common shares to purchasers of bonds as an inducement to subscribe and such bonus is an essential consideration in such circumstances and the illegality or nullity of the issue of common shares will avoid the subscription: *Dorchester Electric Co.* v. *King* (1915) 24 D. L. R. 373; 48 Que. S. C. 471.

Where bonds are purchased subject to the approval of the purchaser's solicitor such approval is a condition precedent to the agreement becoming binding on the purchaser: *Canada Investment* v. *Scotstown* (1915) 48 Que. S. C. 97.

(f) Debenture stock.

Debenture stock.

The question is frequently asked, having regard to the name debenture stock, whether it is possible to confer upon the purchasers of debentures, bonds or debenture stock a power to act also as shareholders and thereby to assume control of the company in case their securities are in default. Certain of the statutes, among others, the Railway Act, confer upon debenture holders this right, but unless the power is specially given by the statute and it is not so given under the Dominion Act, debenture holders as such have no such right. This object can, however, be accomplished by a transfer by the promoters or other large shareholders to a trustee of a portion of their own shares fully paid-up, to be held in trust for the promoters until default occurs upon the debentures, bonds or debenture stock, and after that to be held in trust as regards its voting power for the holders of debentures, bonds or debenture stock. By means of such a voting trust the security holders can elect a majority of directors and control the management of the company.

The following description of the difference between debentures and debenture stock is taken from Palmer's Precedents, 11th ed., Part III, at page 6:—

"(1) 'Debenture' is the name given to an instrument embodying a contract, usually under seal.

(2) Debenture stock is the name given to a debt usually created by a trust deed or debenture."

Debenture stock is, to use Lord Justice Lindley's words, "borrowed capital consolidated into one mass for the sake of convenience."

Compared with debentures.

Hence, the two things cannot be compared; they differ as much, *inter se*, as a mortgage *deed* and a mortgage *debt*. But if the question be varied to [and one is asked], "what is the difference between the position

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Debenture stock.

of a debenture holder and that of a debenture stockholder," the answer is that the terms "debenture holders" and "debenture stockholders" do not import any substantial difference of position. Thus:—

(1) As to time of payment:—Money secured by debentures is generally made payable at a fixed date, say, five, ten or twenty years from the date of issue, and although so-called perpetual debentures are sometimes issued, they are exceptional. On the other hand, debenture stock, though sometimes made payable at a fixed date, is more commonly made payable only in the event of a winding-up, or of default by the company in paying the interest for, say six months, the company reserving power to itself to redeem after a term, say, of ten or twenty years on giving six months notice of its intention to redeem.

(2) As to payment of interest:—Here there is no practical difference. In each case the interest is usually paid by warrant, or on presentation of coupons issued with the debentures or with the stock certificates.

(3) As to security:—In most cases the security is practically the same in substance, though the form differs slightly. Debentures are commonly secured by a charge appearing in the debentures themselves, sometimes by trust deed, which is also the instrument which constitutes the stock.

(4) As to transfer:—The mode of transfer of both is substantially the same—if the debenture or debenture stock is to bearer, the transfer is by delivery; if to registered holder by instrument in writing. But in the case of registered debentures the transferee keeps the original debenture; whereas in the case of registered debenture stock the transferor's certificate of title is given up to the company to be cancelled, and a new certificate is issued to the transferee just as in the case of a transfer of shares.

(5) Divisibility of stock:—A debenture is always for a fixed sum, say £100, of which the total amount to be secured by the series is a multiple and the fixed sum is generally (but see p. 284) indivisible, whereas debenture stock, unless it is otherwise provided, can be

transferred in any amounts, *e.g.* £550 or £71 or £13-10s. and several small holdings can be consolidated into one large holding, a single certificate being obtained for the aggregate amount, though to prevent complications it is commonly provided that a fraction of £1 or £5 or £10 shall not be transferable. . . . Sects. 69-69M. Debenture stock.

No doubt it is possible so to frame a debenture that a fraction of the amount thereby secured shall be transferable, and so that several debentures may be consolidated into one; but in such cases it is necessary for the company to issue new debentures or a new debenture, and this involves the payment of special stamp duty, whereas a debenture stock certificate to registered holder is exempt from stamp duty, at any rate if framed in the ordinary way.

(6) Investors generally prefer a single certificate of title to a heavy bundle of debentures.'

(g) Mortgage bonds.

Where a debenture is more than a mere promise to pay and purports to confer a charge on the company's assets by way of security, such mortgage or charge may be conferred either by the debenture itself or by a covering trust deed, or by a combination of the two.

The charge, furthermore, may be specific or floating. A specific charge, as the name implies, is one which attaches to definite and ascertained property, and except in so far as the company is given the right to deal with such property its power to do so ceases on the giving of the charge; it is an absolute assignment by way of mortgage and its subject matter becomes the property of the mortgagee subject to the mortgagor's right of redemption. A floating charge on the other hand is an equitable charge of the undertaking and assets of the company for the time being as a going concern. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favor the charge is created intervenes. His right to intervene may, of course, be suspended by Specific charge. Floating charge.

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Floating charge.

agreement, but if there is no agreement for suspension he may exercise his right whenever he pleases after default, per Lord Macnaghten in *Government Stock* v. *Manila Railway* (1897) A. C. 81 at p. 86. And the same judge in *Houldsworth* v. *Yorkshire Woolcombers' Association* (1904) A. C. 355, defined the term at p. 358 as follows, "A floating charge....is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect, until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."

Creation of.

A floating charge may be created by apt words either in the debenture itself; *Re Farmers' Loan and Savings Co., Debenture Holders' Case* (1899) 30 O. R. 337; *Johnston* v. *Wade* (1908) 17 O. L. R. 372, or in a covering trust deed: *National Trust* v. *Trusts and Guarantee* (1912) 26 O. L. R. 279.

Form of words.

It is not necessary that any special form of words should be used and in *Yorkshire Woolcombers' Association* (1903) 2 Ch. 284, Romer, L.J., in the Court of Appeal, said that a mortgage by a company which contains the following characteristics is a floating charge: "(1) If it is a charge on a class of assets of a company present and future: (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some future step is taken by or in behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."

Thus in *Trusts and Guarantee* v. *Abbott Mitchell* (1906) 11 O. L. R. 403, the bond mortgage of all the company's real estate and assets provided that the trustees should permit the company to continue and carry on its business and that the company might pledge or mortgage assets of a certain description. A subsequent clause provided that advances made by the trustees for bondholders should have priority over

every other advance made to the company. In effect it was held that the foregoing provisions gave the trustees a floating charge and that the company was entitled to create a specific charge ranking in priority.

When a mortgage is made, not by a manufacturing company, but, *e.g.*, by a theatre company, where the chattels charged would not be changed with the same frequency as they would in the case of a manufacturing company, it may be more difficult to infer that the charge is floating and not specific. But where such a company operated a number of theatres and charged all the furniture, loose effects, plant, machinery, &c., upon various premises present and future, and the mortgage contained a provision that the company would conduct its business in a proper manner, and the company had no power to let any of the premises mortgaged without the consent of the mortgagees, it was held that this was a charge upon a class of chattels, which, as to some of them would, and as to all of them might, necessarily be changed from time to time in the ordinary course of business. And, although the mortgage was not expressly in form a floating charge, it was held that it was not intended to interfere with the ordinary carrying on of the company's business and as far as the chattels were concerned created a floating charge only: *National Provincial Bank of England* v. *United Electric Theatres* (1916) 85 L. J. Ch. 106. Astbury, J., in that case remarked that if it had been intended that the charge should operate as a specific charge with regard to the chattels existing at the date of the mortgage a schedule of them might have been provided.

Floating charge.

When a debenture set out that the interest thereon was "guaranteed by the capital and assets of the company invested in mortgages upon approved real estate," it was held that the intention was to secure payment of the principal and interest, to be secured on the capital and assets of the company, and it was held that the debentures were a charge on the assets and capital of the company and that on a winding-up they were entitled to rank ahead of unsecured claims: *Re*

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Bonds.

Floating charge.

Farmers' Loan and Savings Co. Debenture Holders' Case (1899) 30 O. R. 337. In *Panama, &c. Co.* (1870) L. R. 5 Ch. 318, where the company charged its "undertaking" with payment of the debentures issued, Giffard, L.J., held that the use of the term implied that the business of the company was to continue and that the charge was therefore a floating one; see also *Johnston* v. *Wade* (1909) 17 O. L. R. 372, where the words used were "the company hereby charges with such payments its undertaking and all its property real and personal, rights, powers and assets of every description present and future, including its uncalled capital."

Such a charge leaves the company at liberty to create specific mortgages ranking in priority to it: *Government Stock* v. *Manila Ry.* (1897) A. C. 81, and where purchase money is advanced on the security of the property purchased the lender takes priority over an earlier floating charge: *In re Connolly Bros., Wood* v. *The Company* (1912) 2 Ch. 25, where the lender's solicitor took and retained the title deeds on the conveyance to the company of the property in question. So a specific assignment to a third party of book debts or of arrears of rent under leases covered by a floating charge will take precedence over the floating charge and the receiver for bondholders: *In re Ind. Coope & Co.* (1911) 2 Ch. 223.

Similarly, where a company mortgages its undertaking by way of floating charge which covers assets, the property in which under the terms of sale to the company is to remain in the vendor until payment, on the company's failure to pay, the vendor takes precedence over the receiver for debenture holders, notwithstanding that the latter has no knowledge of the vendor's claim: *In re Morrison, Jones & Taylor* (1914) 1 Ch. 50.

Commonly the right is reserved on the part of the company of dealing with its property in the ordinary course of business. As to the effect of such a clause see *Cox Moore* v. *Peruvian Corporation Ltd.* (1908) 1 Ch. 604.

Notice does not affect a subsequent specific mortgagee, *Re Hamilton's Windsor Iron Works* (1879) 12 Ch. D. 712.

Floating charge.

A floating charge will also give the debenture holders priority over execution creditors, *Re Standard Mfg. Co.* (1891) 1 Ch. 627; *Re Opera Lim.* (1891) 3 Ch. 260; *Davey & Co.* v. *Williamson* (1898) 2 Q. B. 194. It will also give priority over a creditor who gets a garnishee order, if a receiver is appointed before creditor obtains payment: *Cairney* v. *Buck* (1906) 2 K. B. 746.

Under sections 69K of the Act, and 70 of the Winding-up Act, claims which are made preferential under the Winding-up Act, are entitled to priority over a floating charge when a receiver is appointed or the bondholders take possession, even though the company is not at the time in course of being wound up.

Prohibition against creating prior charges.

The clause creating a floating charge may contain words which prohibit the company from making any mortgage or charge in priority thereto. Where the debenture charges specified assets, with a provision, "but so that the company is not to be at liberty to create any mortgage or charge in priority to or *pari passu* with the said debentures" such words will not imply the right to create a floating charge contrary to the terms of the specific charge already given: *Grigson* v. *Taplin* (1916) 85 L. J. Ch. 75. Such a restriction will be good, except, of course, as against a mortgagee for value without notice: *English & Scottish Co.* v. *Brunton* (1892) 2 Q. B. 700; *Re Castell & Brown, Ltd.* (1898) 1 Ch. 315; *Re Valletort Sanitary Steam Laundry Co.* (1903) 2 Ch. 654. The plea of purchase for value without notice must be proved in its entirety: *Union Bank* v. *Indian and General, Etc.* (1908) 3 E. L. R. 409, (1908) 40 S. C. R. 510.

Sale of business.

A company having power to do so can sell one of several businesses, or its whole undertaking, notwithstanding the existence of a floating charge: *Metropolitan Bank* v. *Vivian* (1900) 2 Ch. 654; *In re Borax Co.* (1901) 1 Ch. 326. While the license to the company to

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carry on its business continues, a debenture holder cannot require that a particular debt owing to the company be paid to him: *Robson* v. *Smith* (1895) 2 Ch. 118.

A seizure under a landlord's right of distress will take precedence over a floating charge, if exercised before the security ceases to float: *Lee* v. *Roundwood Colliery* (1897) 1 Ch. 373.

Crystallization of floating charge.

When the business of the company ceases, a floating charge crystallizes, and the rights of debenture holders attach: *Re Panama* (1870) 5 Ch. 318; *Re Farmers' Loan and Savings Co.* (1899) 30 O. R. 337. The mere fact of the company being in default is not sufficient to make the charge cease to float: *Government Stock* v. *Manila Ry.* (1897) A. C. 81. The debenture holders must take some step to enforce their security, *e.g.*, by the appointment of a receiver: *Nelson* v. *Faber* (1903) 2 K. B. 376.

In the last mentioned case it was held that the holders of second debentures which were expressed to be subsequent to a prior issue were not precluded from getting payment of their debentures in cash or by set-off, while the charge in the first debenture remains uncrystallized. The fact that the debentures were expressed to be subsequent to an existing issue only referred to the relative priority of the debentures as *charges*.

The mere issue of a writ is insufficient. In *Re Hubbard & Co.* (1898) W. N. 158, the company was held entitled to issue further debentures after a writ had been issued, but before a receiver had been appointed.

Where an order appointing a receiver had been made but not drawn up and never became effective, a landlord's distress was held to take priority over the debenture holders: *Lee* v. *Roundwood Colliery* (1897) 1 Ch. 373.

And an equitable mortgage by a deposit of title deeds, coupled with a memorandum of equitable charge, is entitled to priority over a floating charge, where the mortgagee takes without notice, although the particular property is, by the terms of the debenture, prohibited from being charged by the company in

priority to the debentures: *Re Castell & Brown, Ltd.* (1898) 1 Ch. 315. Sects. 69-69M.

A creditor who holds second debentures can set these off against a debt due by him to the company in respect of goods purchased while the company was a going concern and before the holders of prior debentures containing a floating charge appointed a receiver, even though the second debentures are expressed to be subject to the prior floating charge: *Nelson* v. *Faber & Co.* (1903) 2 K. B. 367.

9. Trust deed to secure bonds.

It is usual in this country for bonds to be secured by a trust deed, which procedure carries with it many advantages; in particular, the rights of the trustee, bondholders and company can be more completely defined, and furthermore where the trust deed, as is usually the case, contains a specific charge of real estate, the trust deed itself or a specific charge given pursuant thereto can be registered as an encumbrance against the lands affected in compliance with the provisions of local registration laws. It has been held in British Columbia that a charge conferring a floating security only, could be registered under the local land Registry Act: *In re Land Registration Act* (1901-4) 10 B. C. R. 370. Registration as a land mortgage.

Where the trust deed confers a mortgage of the chattels of the company, it can be and should be registered as a chattel mortgage. As this is sometimes objected to by the company on the ground that such a course would affect the company's business reputation or credit, it is important to consider the effect of non-registration as a chattel mortgage. In practice registration as a chattel mortgage should be insisted upon. As a chattel mortgage.

Under the Ontario Bills of Sale and Chattel Mortgage Act, R. S. O. (1914) c. 135 and the acts of other provinces containing similar provisions, a trust deed requires registration for its validity in order that it may be effective as regards *goods and chattels* described in it: *National Trust* v. *Trusts and Guarantee* Non-registration.

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(1912) 26 O. L. R. 279; *Bank of Montreal* v. *Kirkpatrick* (1901) 2 O. L. R. 119. So far, however, as the subject matter charged does not answer to the description of goods and chattels within the meaning of these Acts, the mortgage may be severed, and while it may be invalid as regards goods and chattels for lack of registration, it may be valid as regards other assets not coming within that description. Thus in *National Trust* v. *Trusts and Guarantee, supra,* the trust deed was held to confer a valid security with respect to book debts, because the latter were choses in action and did not come within the description of goods and chattels. The decision followed on this point the earlier case of *Kitching* v. *Hicks* (1884) 6 O. R. 739, and *Thibaudeau* v. *Paul* (1894) 26 O. R. 375.

Registration of trust deed as a chattel mortgage.

The Ontario Bills of Sale and Chattel Mortgage Act is for the protection of creditors, and in *Re Canadian Shipbuilding Co.* (1912) 26 O. L. R. 564, Riddell, J., held that the protection did not extend to the liquidator of the company. Consequently it was held that the liquidator had no *locus standi* to impeach a bill of sale for want of registration, the dictum to the contrary in *Re Canadian Camera Co.* (1901) 2 O. L. R. 677 being dissented from. This decision is in conflict with the decision of Teetzel, J., on this point in *National Trust* v. *Trusts and Guarantee, supra,* which was followed in Alberta in *Imperial Canadian Trust Co.* v. *Vallance* (1915) 24 D. L. R. 241.

Liquidator.

If, however, there is no covering trust deed and the charge is contained, as it may be, in the debentures themselves, the Bills of Sale and Chattel Mortgage Acts will not apply and registration is not necessary for the validity of the security: *Johnston* v. *Wade* (1908) 17 O. L. R. 372.

Floating charge.

It is arguable that different considerations apply to a floating charge. A floating charge transfers no title to any property in existence or to after acquired goods, and confers upon the chargee no right to take possession or interfere with the subject matter of the floating charge except in the event of default, but in *National*

Trust v. *Trusts and Guarantee* (1912) 26 O. L. R. 279, the floating charge was held invalid except in so far as it related to book debts. Sects. 69-69M.

Where parties intend to give security by way of a chattel mortgage within the meaning of the Alberta Bills of Sale Ordinance and the instrument is defective for non-compliance with the Act it cannot be justified as creating a floating charge, and is void as against creditors: *Imperial Canadian Trust Co.* v. *Wood Vallance* (1915) 24 D. L. R. 241.

Section 82 (2) of the Ontario Companies Act, R. S. O. 1914, s. 178, requires a duplicate original of every mortgage securing bonds, debentures or debenture stock to be filed in the office of the Provincial Secretary. Probably this provision is directory only and not imperative, see *Wright* v. *Harton* (1887) 12 App. Cas. 371, a decision under a similar provision of the English Companies Act then in force. Although it is difficult to see how the Ontario Act can affect Dominion companies it is the practice to file a duplicate original of the trust deed as an additional precaution where Ontario assets are charged. Registration under Ontario Act.

If it is desired not to register the trust deed as a chattel mortgage either one of the following plans may be adopted; but it must be remembered that there is no certainty of absolute security without such registration and in view of the change in the practice in this regard it is difficult to see how the registration of a bond mortgage as a chattel mortgage can injuriously affect the credit of a company. (1) In the trust deed create only a fixed charge on real estate and fixtures making no reference to any floating charge. Then in the bonds themselves insert a clause creating a floating charge. Possibly the case of *Johnston* v. *Wade* applies so as to give the bonds validity without registration notwithstanding the existence of a covering trust deed capable of registration under the Bills of Sale and Chattel Mortgage Acts. (2) Or else, have the trust deed contain the usual provisions as to floating charge and in addition have the company execute a collateral deben-

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ture itself containing a floating charge. It is an additional precaution to require the execution of such a collateral debenture even though the principal trust deed is registered as a chattel mortgage.

Registration under the Act, s. 69 A (1) iii.

Registration of the prescribed particulars of any mortgage or charge is now required to be made by the company in the Department of the Secretary of State. This provision is taken from the Imperial Companies (Consolidation) Act, 1908, s. 93. Non-registration makes the mortgage or charge void "against the liquidator and any creditor of the company," s. 69A (1), but it remains good as against the company. A creditor, to take advantage of the section, must be a creditor in relation to the mortgagor: *Dalton* v. *Dominion Trust Co.* (1918) 3 W. W. R. 42 (B.C.). The certificate of the Secretary of State is conclusive evidence of compliance with the section: *Yolland Husson & Co., Ltd.* (1908) 1 Ch. 152; *Cunard Steamship Co.* v. *Hopwood* (1908) 2 Ch. 152. Where the particulars of the trust deed itself are registered, specific charges given pursuant thereto are not required to be registered: *Cunard Steamship Co.* v. *Hopwood, supra.*

The company is also required to endorse a copy of the certificate of registration on the bonds issued, keep a register of mortgages and comply with the other statutory provisions of ss. 69A-ff.

The provisions of the Act cannot be evaded by taking an assignment absolute in form, but intended to operate as a mortgage: *Re Metropolitan Mortgage and Savings Co.* (1915) 7 W. W. R. 1204, decided under s. 102 of the British Columbia Act. See also *Wickson Co., Ltd.* v. *Dominion Creosoting Co., Ltd.* (1917) 55 S. C. R. 303.

The equitable doctrine of notice does not apply under the section, so that a duly registered bond takes priority over an unregistered mortgage, even where the bondholder took his bond with notice of the prior mortgage: *In re Monolithic Bldg. Co.* (1915) 84 L. J. Ch. 441; (1915) 1 Ch. 643.

Form of trust deed.

A trust deed to secure debentures follows, to some extent, the ordinary form of mortgage with power of

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sale, but the standard forms now in use contain many and elaborate provisions for the protection of the bondholders, the trustee and the company.

An acceleration clause, similar to that in a mortgage, is frequently inserted, and is recognized as effectual by the courts: *Wallingford* v. *Mutual Society* (1880) 5 App. Cas. 685.

As to the effect of trust deeds to secure the payment of mortgage bonds, see *Hatherton* v. *Temiscouta Ry. Co.* (1897) Q. R. 12 S. C. 481; *Wallbridge* v. *Farrell* (1890) 18 S. C. R. 1; *Redfield* v. *Wickham*, 13 A. C. 467.

(1) Position of, powers and duties of the trustee.

Where bonds are secured by a covering trust deed a trustee is therein appointed, in whom the title to the assets specifically charged is vested. The trustee appointed is commonly a trust company and it is important that the trustee should be authorized under the local laws of the province in which the assets are situated to hold such assets as mortgagee and be entitled to enforce by action the trusts of the mortgage. The Extra-provincial Corporations Acts of the various provinces make the obtaining of a license a condition precedent to the right to hold lands and non-compliance with this requirement would seriously affect the security of the bondholders. In a New Brunswick case, however, under such circumstances, bondholders were held entitled in equity to a first charge on the assets mortgaged against the company and its liquidator: *Harrison* v. *Nepisiguit Lumber Co.* (1912) 11 E. L. R. 314.

Moreover, in all the provinces an unlicensed foreign corporation is debarred from suing in the local courts, and while this prohibition is ineffective against a Dominion company, *John Deere Plow Co.* v. *Wharton* (1915) A. C. 330, it is good against other foreign companies: *Assiniboia Land Co.* v. *Acres* (1916) 10 O. W. N. 328. Under most of the Extra-provincial Corporations Acts the mortgage would not be void but only unenforceable and on compliance with the statute the right to sue would arise: *Smith* v. *Western Canada*

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Flour Co. (1911) 17 W. L. R. 531, a case under the Alberta Foreign Companies Ordinance.

Position of, powers and duties of trustee.

The duties of the trustee and its rights and powers with reference to the mortgaged assets are defined by the terms of the trust deed. These do not compel the trustee to intervene for the purpose of protecting or enforcing the security except on requisition of the bondholders and then only upon proper indemnification.

Modern trust deeds contain elaborate provisions for the protection of the trustee. In particular, liability for acts of agents selected with reasonable care, and responsibility for anything except wilful misconduct, gross negligence or intentional breach of trust on the part of the trustee, are excluded. The importance of such a clause is illustrated by *Stothers* v. *Toronto General Trusts Corporation* (1919) 44 O. L. R. 432.

Where the trust deed provides for a sinking fund to be applied in the purchase of bonds which are offered for redemption at the lowest price, the lowest price means the lowest average price obtainable. And if the trustee, by paying a higher price for a block of bonds which will exhaust the moneys at its disposal, thereby succeeds in redeeming a larger number of bonds than if it had accepted a lower tender for a small block and had had to pay more for the balance required to exhaust the moneys in its hands, then the trustee is entitled to reject such lower tender: *Whicher* v. *National Trust* (1912) A. C. 377.

A trustee for bondholders may become a purchaser as such trustee on the sale of the mortgaged assets: *Royal Trust Co.* v. *Baie des Chaleurs Ry.* (1907-12) 13 Ex. Ct. Rep. 1.

The mortgagee must protect to the best of its ability the security it has taken for the bondholders, and therefore may bring an action to enforce the trusts of the mortgage: *Hatherton* v. *Temiscouta Ry.* (1897) Q. R. 12 S. C. 481.

As to the custody of title deeds, there is no implied covenant on the part of a mortgagee to take reasonable

care of them during the continuance of the security: *Gilligan* v. *National Bank* (1901) 2 Ir. 513.

Remuneration.

The company should covenant to pay the trustee's reasonable remuneration, and the trust deed should also provide that this is to be paid out of the mortgaged assets, otherwise the trustee may fail to obtain priority over the bondholders for its remuneration out of proceeds paid into Court on the sale of the assets in a debenture holders' action: *In re Accles, Ltd.* (1902) 51 W. R. 57. It is important that the remuneration should be expressed to continue until the assets are realized: *Paul* v. *Piccadilly Hotel, Ltd.* (1911) 2 Ch. 534.

Where a receiver is appointed the services of the trustee in the ordinary course of things come to an end and remuneration will not be continued: *In re Locke & Smith, Ltd.* (1914) 1 Ch. 687.

But in every case it would appear to be a question of the proper construction of the trust deed; and where the trust deed provided for the payment of a yearly sum to the trustees for their services as trustee *during the continuance of the security*, it was held, that notwithstanding the appointment of a receiver under a prior trust deed, the sale of the company's property, the payment off of the first mortgage debentures and the payment into Court of the balance of the proceeds, the trustees were entitled to their remuneration during the continuance of the security: *In re British Consolidated Oil Corporation* (1919) 88 L. J. Ch. 260.

As to the principles on which remuneration has been awarded by the Court see *Toronto General Trusts* v. *Central Ontario* (1905) 6 O. W. R. 350. See also on remuneration of the trustee, *Hanson* v. *Montreal Park and Island Ry.* (1902-3) 5 Que. P. R. 355; *Royal Trust Co.* v. *Atlantic and Lake Superior Ry.* (1907-12) 13 Ex. Ct. Rep. 42, at p. 60. A trustee may sue the company for its own remuneration without obtaining authorization from the bondholders: *Hatherton* v. *Temiscouta* (1897) Que. 12 S. C. 481.

(2) Interest.

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It is advisable for the trust deed to provide that interest shall be payable at the agreed rate both before and after maturity and before and after default, otherwise interest will only after maturity be allowed as damages and will be computed at the statutory rate which is five per cent. per annum: R. S. C. (1906) c. 120, s. 3; *People's Loan and Deposit* v. *Grant* (1890) 18 S. C. R. 262; *Plenderleith* v. *Parsons* (1907) 14 O. L. R. 619. Where a rate higher than the statutory rate is contracted for it can be recovered: *Middleton* v. *Scott* (1902) 4 O. L. R. 459; *Pringle* v. *Hutson* (1909) 19 O. L. R. 652, but the provision must be specific. "Until paid" or "fully paid and satisfied" are insufficient. This has been held to mean up to the day fixed for payment of principal, and not to carry the implication that subsequent interest is to be paid at the same rate: *People's Loan and Deposit Co.* v. *Grant* (1890) 18 S. C. R. 262.

Where the trustee under a mortgage to secure bonds makes a declaration under an acceleration clause calling in the principal and interest, it has been held that interest at the rate provided for and not at the statutory rate was payable after the date of the declaration. The mortgagor by the interest coupon expressly promised to pay a specific sum of money on a specified date at a specified place, and the rate of interest was not affected in any way by default occurring within the period covered by the agreement for interest. The debt was not being detained any more after the declaration than before and it is only where the party is detaining the debt beyond the period during which the rate of interest is agreed upon that the statutory rate applies: *Eastern Trust* v. *Cushing Sulphite* (1906) 2 E. L. R. 93; 3 N. B. Eq. 392.

Where a judgment has been recovered for principal interest and costs the original debt is merged in the judgment and interest at the statutory rate only is allowed: *European Central Ry.* (1876) 4 Ch. D. 33. A covenant to pay interest may be so expressed as not to

merge in a judgment, *e.g.*, a covenant to pay interest so long as any part of the interest remains due either on the covenant or on a judgment, per Fry, L.J., in *Ex parte Fewings* (1884) 25 Ch. D. 338, at p. 355, and see *In re Agricultural Cattle Insurance Co.* (1876-7) 4 Ch. D. 34n, and *Popple* v. *Sylvester* (1883) 22 Ch. D. 98. Sects. 69-69M.

In a winding-up a bondholder can only prove interest to the date of the winding-up: *Re Winding-up Act and Summerside Electric* (1908) 5 E. L. R. 129, 139.

Coupons.

It is usual to make the interest on bonds payable by coupons to bearer, and where this is done such coupons are negotiable securities: *Toronto General Trusts* v. *Central Ontario Ry. Co.* (1905) 10 O. L. R. 347; *McKenzie* v. *Montreal and Ottawa Ry.* (1878) 29 U. C. C. P. 333: *Connolly* v. *Montreal, &c., Ry. Co.* (1901) Q. R. 20 S. C. 1. A coupon detached from the bond to which it relates does not lose the benefit of the mortgage lien: *Trusts and Guarantee* v. *Grand Valley Ry. Co.* (1919) 44 O. L. R. 398, 412. The holder of detached coupons can sue on them without being at the same time holder of the bond: *McKenzie* v. *Montreal, &c., Co., supra.*

The holder, however, takes subject to the terms of the trust deed, *e.g.*, that no action shall be brought except by the trustee: *Levis County Ry.* v. *Fountaine* (1904) Q. R. 13 K. B. 523. Coupons on bonds secured by a trust deed partake of the nature of a specialty and are barred in twenty years: *Toronto General Trusts* v. *Central Ontario Ry. Co.* (1903) 6 O. L. R. 534; (1904) 8 O. L. R. 604.

As to the circumstances under which the acquisition and payment of coupons will have the effect of preserving the lien and the right to rank with the bond for interest payments; see *Trusts and Guarantee Co.* v. *Grand Valley Ry. Co., supra,* and cases cited.

Bond interest is payable whether there are profits or not unless it is expressly provided that interest shall be payable out of profits only. Such bonds are called "income bonds." Where interest is payable out of net

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profits only the company is not entitled to carry the net profits forward, but must set aside so much as is necessary for the maintenance of the security and use the balance in payment of interest on the bonds: *Heslop* v. *Paraguay Central Ry.* (1910) 54 S. J. 234.

If the assets of a company are insufficient to pay in full the principal of the bonds and arrears of interest the assets ought to be distributed rateably according to the amounts due for principal and interest although some of the bondholders have been paid interest down to a later date than others. The latter are not entitled to any preferential payment of arrears: *In re Midland Express* (1914) 1 Ch. 41. From the time when the security crystallizes there can be no priority among the bondholders, per Swinfen Eady, L.J., at p. 49.

(3) Redemption.

Bonds may be perpetual, redeemable on notice or may be for a fixed number of years. A company would not have power to issue irredeemable bonds in the absence of such a provision as is contained in s. 69 (3): *In re Southern Brazilian Rio Grande del Sul Ry. Co.* (1905) 2 Ch. 78.

Redemption.

The use of the term "irredeemable" usually means that the company has no power to redeem, but, if the context so requires, may mean that the bondholder cannot claim redemption: *Willey* v. *Joseph Stock & Co.* (1912) 2 Ch. 134, note.

Bonds for a fixed term of years are not redeemable before maturity at the option of the company without the consent of the holders. Where a company as an alternative to making a fixed portion of its bond indebtedness repayable annually (which can be accomplished by means of the issue of "serial" or "instalment" bonds) desires to have the *option* to retire annually a proportion of its bonds, the trust deed may contain special clauses relating to the redemption of bonds, providing for the creation of a sinking fund and the retirement of a certain proportion of bonds annually by means of drawings.

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Where the trustee, under a provision in the trust deed, is directed to purchase bonds offered to it for redemption at the lowest price, that means the price which is lowest on the average as applied to the whole block purchased: *National Trust* v. *Whicher* (1912) A. C. 377.

Where bonds are expressed to be "redeemable" at a certain date it means that the company may redeem them if it so desires, but is not obliged to do so: *Morrison* v. *Chicago and N. W. Granaries* (1898) 1 Ch. 263.

Where debentures contained a covenant for redemption "on or after" a certain date, with a further provision that the particular debentures to be paid off would be determined by ballot and that six months' notice would be given by the company of the debentures drawn for payment, the company having failed to hold any ballot, one of the debenture holders gave the notice and it was held that the principal moneys became presently due and payable: *In re Tewkesbury Gas Co.* (1911) 2 Ch. 279.

Where the principal is made to fall due on the occurrence of a certain event, *e.g.*, a winding-up, the company or the guarantors of the bonds are entitled to redeem, and the bondholders, in the absence of other provisions in the bonds, have no option to refuse redemption: *Consolidated Gold Fields of South Africa* v. *Summer & Jack East, Lim.* (1913) 82 L. J. Ch. 214.

Clogging the equity of redemption.

The ordinary rule of "once a mortgage always a mortgage" and the principle that any stipulation which restricts or clogs the equity of redemption is void, apply to mortgages by a company.

Thus where a company to secure a loan, pledged its bonds with an option to the pledgee to purchase at forty per cent. within twelve months, the loan to become due on thirty days' notice by either side, it was held the option was void on the lender endeavoring to exercise it within the twelve months and before notice of redemption had been given by the company. The company was entitled to redeem on payment of principal, interest

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and costs: *Samuel* v. *Jarrah Timber, &c., Corporation* (1904) A. C. 323.

But where the stipulation by the mortgagee is a collateral contract, though contemporaneous, in substance independent of the security, and not unfair, the Court will enforce the bargain of the parties: *Kreglinger* v. *New Patagonia, &c., Co.* (1914) A. C. 25. In that case the lenders advanced money to the borrowers upon the security of a floating charge over all their property present and future, and agreed not to demand redemption for a period of five years, but the borrowers were to be at liberty to repay the debt at an earlier period on giving notice. The agreement also contained a provision that the borrowers should not sell any sheepskins to any purchasers other than the lenders for a period of five years from the date of the agreement so long as the lenders were willing to purchase the same at an agreed price. The loan was paid off before expiration of the five years. It was held that the option of purchasing the sheepskins was not terminated but continued for the period of five years.

Quære, whether the doctrine against clogging the equity of redemption applies to debentures secured by a floating charge: *DeBeers Consolidated Mines, Ltd.* v. *British South Africa Co.* (1912) A. C. 52, per Lord Atkinson, at p. 68.

(4) Enforcing the security on default.

Default may occur under the trust deed or independently of its provisions. It occurs under the trust deed if one of the events happens on the occurrence of which the security is expressed to become enforceable, *e.g.,* non-payment of principal or interest, failure to pay taxes, suffering an execution to be levied against the mortgaged premises, etc., etc.

Independently of any provision in the trust deed the security becomes enforceable, so far as the mortgage of the company's undertaking is concerned, if the company ceases to carry on its business: *Hodson* v. *Tea Co.* (1890) 14 Ch. D. 859 (appointment of a receiver): *In re Crompton & Co.* (1914) 1 Ch. 954 (re-

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solution for voluntary winding-up); *Wallace* v. *Universal Automatic Machine Co.* (1894) 2 Ch. 547 (compulsory winding-up).

If the trust deed calls for payment at a specified place, *e.g.*, at the registered office of the company, there is no default unless the bondholder presents himself at that place and demands payment: *In re Escalera* (1908) 25 T. L. R. 87. If more than one place is named for payment, *e.g.*, at a specified bank or at the head office of the company, then it is for the person to whom payment is to be made to fix the place of payment, and unless he has done so there is no default: *Thorne* v. *City Rice Mills* (1889) 40 Ch. D. 357, 359. Whether there has been default is a question to be determined on the wording of the trust deed. In *In re Harris Calculating Machine Co.* (1914) 1 Ch. 920, the conditions endorsed on the debentures were as follows:—

"(3) The principal moneys hereby secured shall immediately become payable . . . if the registered holder shall serve notice upon the company requiring payment of the principal moneys and interest (if any) and the company has made default . . . for three days after such service:" "(12) the *principal* moneys . . . will be paid at Lloyds Bank, Limited, 222 Strand, W.C., or other the company's bankers for the time being, on presentation of this debenture, which must be surrendered on payment."

A bondholder gave notice to the company requiring payment of principal and interest within three days, but neither principal nor interest was paid, and the bondholder then commenced a debenture-holder's action, claiming the usual relief. The defence stated in general terms that the money was not due. It was held that there had been default in payment of interest under condition 3 and that, therefore, compliance with condition 12 as to presentation for payment was unnecessary in order to render the principal liable.

If presentation is requisite it is a condition precedent and should be pleaded in defence: *In re Harris Calculating Machine Co.* (1914) 1 Ch. 920.

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Enforcing the security on default.

The bondholders or the trustee on default occurring in payment of principal or interest have all the remedies of a mortgagee. They may sue the company on the covenant for repayment, or they may apply to the court for the appointment of a receiver, or may bring action of foreclosure. The latter remedy will only be granted if all the bondholders are before the Court: *In re Continental Oxygen Co.* (1897) 1 Ch. 511. The usual acceleration clause, whereby in the event of default for a stated period the whole principal sum becomes due, is a cumulative provision and does not interfere with the right to foreclosure which becomes immediately exercisable on the occurrence of default: *Farmers' Loan and Trust* v. *Nova Scotia Central* (1891-2) 24 N. S. R. 542. Immediately on default the trustees for bondholders can sue, even though there may be other remedies provided in the trust deed which are not available until after a stated period has elapsed: *Allan* v. *Manitoba and Northwestern* (1894) 10 Man. L. R. 106.

The trustee for bondholders may, if the right is given by the trust deed, enter and take possession and sell. In *Wade* v. *Crain* (1915-16) 35 O. L. R. 402, an unpaid vendor of lands, whose agreement permitted him on default of the purchaser to enter and take possession, on default occurring took possession not only of the lands but also of certain chattels which were claimed in an action by the liquidator. The vendor attempted to justify the taking of the chattels under the terms of a charge conferred by bonds of which he held some $24,000 out of an issue of $100,000. The Appellate Division held that the attempted justification failed and that in the absence of the other bondholders who were not before the Court there should be no adjudication on the right to prove on the bonds in the winding-up. The judgment of the Appellate Division was affirmed by the Supreme Court of Canada (1918) 55 S. C. R. 208.

A bondholder may, if principal or interest is unpaid, file a winding-up petition: *Borough of Portsmouth*

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Tramways (1892) 2 Ch. 362; and a bondholder who has brought an action and obtained the appointment of a receiver is not thereby disentitled from petitioning to wind up, *ibid.* A bondholder whose principal or interest is not due is not a creditor entitled to petition for a winding-up order: *In re Melbourne Brewery* (1901) 1 Ch. 453.

Jeopardy.

The bondholders need not, however, wait until the events on which the mortgage becomes enforceable occur. If, for example, judgments have been recovered against the company and executions are likely to issue the bondholders are entitled to have a receiver appointed even though the company is not in default: *Grigson* v. *Taplin* (1916) 85 L. J. Ch. 75: *In re London Pressed Hinge Co.* (1905) 1 Ch. 576; or where the company proposed to distribute its reserve fund which was practically its only asset among the shareholders: *Tilt Cove Copper Co.* (1913) 2 Ch. 588.

This is called the doctrine of "jeopardy," and the principle on which the Court intervenes is that the bondholders need not stand by and see the assets seized by unsecured creditors. It is not sufficient for the plaintiff merely to show that the proceeds of the assets if realized would be insufficient to pay off the bonds: *In re New York Taxicab Co.* (1913) 1 Ch. 1; but see *Braunstein* v. *Marjolaine* (1914) 58 Sol. J. 755, where, however, there were other circumstances present. A mortgagee is entitled as of right to a receiver, although judgment creditors may already have had one of their own appointed: *Allan* v. *Manitoba* (1899) 10 Man. L. R. 101.

Effect of winding-up.

The mere fact that the company has gone into liquidation does not prevent a bondholder from bringing an action to enforce his security: *In re Langendale Cotton Spinning Co.* (1878) 8 Ch. D. 151; *Imperial Paper Mills* v. *Quebec Bank* (1910) 2 O. W. N. 1500, 1502.

Prima facie a mortgagee is entitled to possession of the assets mortgaged to him and a liquidator ought not, by taking possession, to interfere with the security:

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Shortreed v. *Raven Lake* (1909) 13 O. W. R. 720. It was held in the same case that if the parties could not agree as to what was specifically covered by the mortgage the plaintiff might have leave to bring an action or an issue might be directed for this purpose.

If a mortgagee has already commenced an action and a winding-up intervenes he should have leave to proceed except under special circumstances, or unless the same relief is given to him in the winding-up as he would obtain in the action: *Re David Lloyd & Co.* (1877) 6 Ch. D. 339. Leave will usually be granted as a matter of course, per Meredith, C.J., in *Re Brampton Gas Co.* (1902) 4 O. L. R. 509, at p. 518, and *Capital Trust Corporation* v. *Yellowhead Pass Coal Co.* (1916) 27 D. L. R. 25; but see *Re International Trap Rock Co., Ltd.* (1915) 8 O. W. N. 599. There a motion was made for leave to proceed to enforce a mortgage, a winding-up having intervened. Lennox, J., made an order allowing the applicants to proceed to enforce their mortgage after the expiration of three months, subject to the right of the liquidator or an unsecured creditor or a shareholder to apply for an extension of time. The judge held that he had a discretion to refuse leave to proceed, adopting the reasoning of Kay, J., in *In re Henry Pound* (1889) 1 Megone 279, and not following *Re David Lloyd & Co.* (1877) 6 Ch. D. 339. In *In re Excelsior Brick Company,* an unreported case decided by Middleton, J., June 22, 1916, an application was made by a bondholder on behalf of himself and all other bondholders for the enforcement of the bonds and a receiver. The company was in liquidation. The liquidator had been appointed receiver under a permissive condition authorizing the majority to do so. There were no assets of the company other than a certain judgment which the liquidator had obtained in an action then in appeal and the proceeds of an encumbered farm when sold. Under these circumstances, as the liquidator would hold all assets subject to the bondholders' rights the judge held that it was inadvisable for the estate to be put to the expense of an action. It was further held that the estate being realized by the

liquidator in both capacities any question raised as to the bondholder's rights to participate in the assets might have to be decided by an action if and when the issue definitely arose and there were assets to which its decision might be applied.

Re International Trap Rock Co., Ltd., appears to be in conflict with an earlier decision of *In re British Columbia Tie and Timber Co.* (1908) 14 B. C. R. 81, where Clement, J., following *Re David Lloyd & Co.*, dismissed a motion by a liquidator for an order to restrain a mortgagee in possession from proceeding to sell, and thought that as the mortgagee's action did not come within any one of the classes of "proceeding" specified in s. 23 of the Winding-up Act, section 22 should not be extended to cover any proceeding outside those classes. But *quære*, whether this decision is good law. It has been held that after a winding-up order property of a company can not be sold for taxes: *School Commissioners of Hochelaga* v. *Montreal Abattoir* (1887) 3 M. L. R. (Q. B.) 116.

Where the bondholders have in an action obtained the appointment of a receiver, and a liquidator is subsequently appointed in a winding up, the receiver will not be displaced unless there is some strong reason for so doing: *Strong* v. *Carlyle Press* (1893) 1 Ch. D. 268. In England the Court will, as a general rule, appoint the liquidator in place of the receiver to act as receiver as well as liquidator where a debenture holder has got an order from the Court appointing a receiver: *In re Joshua Stubbs, Ltd.* (1891) 1 Ch. D. 475; but not where the receiver has been appointed by the debenture holders themselves under a power to do so: *Re Pound, Son & Hutchings* (1889) 42 Ch. D. 402, unless the power has not been exercised *bona fide*: *Maskelyne* v. *British Typewriter* (1898) 1 Ch. 133.

Where a majority of the debenture holders under a power contained in the debentures had appointed the liquidator of the company as receiver and an application was subsequently made for the appointment of another receiver, Britton, J., in *Re Civil Service Co-*

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operative Supply Association (1916) 10 O. W. N. 143, was of the opinion that the majority of the debenture holders could appoint another receiver in place of the liquidator and that the Court was not debarred from appointing another person because of the former action of the majority.

See also *Bank of Montreal* v. *Maritime Sulphide Fibre Co.* (1901) 2 N. B. Eq. 328, where the liquidators under a winding-up order granted subsequently to the appointment of a receiver disputed the validity of the mortgage and the extent of the property covered and the Court held that the receiver (who had been appointed before the winding-up order, but after the application to wind up) should not be discharged but the order appointing the receiver was varied and confined to the property described in the mortgage.

Where the majority was made up in part of debentures equitably mortgaged to the plaintiffs who had not been consulted in making the appointment, it was held that the appointment had not been properly made and that a receiver should be appointed by the Court: *In re Slogger Automatic Feeder Co.* (1915) 84 L. J. Ch. 587.

(5) Who may exercise remedies on default.

It is the right of the bondholders themselves to enforce the security in the absence of a contrary provision in the trust deed, and the action may be brought by a bondholder suing on behalf of himself and all other bondholders making the trustee a co-defendant with the company. It is usual, however, for the trust deed to curtail the right of bondholders to take proceedings and in every case the terms of the document must be looked at to ascertain the bondholders' rights in this regard. Thus, in *Levis County Ry.* v. *Fountaine* (1904) Q. R. 13 K. B. 523, where the trust deed provided that "any proceeding for the purpose of enforcing the principal and interest" of the bonds should be initiated by the trustee in its own name, it was held that such provision deprived the bondholders of the right of suit and was binding on a person who had acquired coupons

which were held to be subject to the covenants contained in the bonds. A contrary principle was stated in *Shaughnessy* v. *Imperial Trust Co.* (1904) 3 N. B. Eq. 5, though the Court in that case held that there was evidence of refusal by the trustee to take proceedings. Sects. 69-69M.

In *Cleary* v. *Brazil Ry.* (1916) 85 L. J. K. B. 32, where the trust deed contained a common provision to the effect that no bondholder should have the right to institute any suit or proceeding for the execution of the trusts of the trust deed, that was held not to disentitle a bondholder from suing for arrears of interest on the covenant contained in the bond and the coupons attached. The usual clause in a trust deed authorizing the trustee to take proceedings on requisition of the bondholders will not prevent trustee from suing for its remuneration without having first obtained authorization from the bondholders: *Hatherton* v. *Temiscouta Ry. Co.* (1897) Q. R. 12 S. C. 481.

(6) Receivers.

A receiver may be appointed by the bondholders themselves or by the trustee where there is a power given in the bonds or covering trust deed, if any; or by the Court in a debenture-holders' action. The circumstances under which the Court will appoint a receiver at the instance of the bondholders have been considered above. Receiver appointed under power.

Very different consequences flow from the two modes of appointment. Trust deeds securing bonds now almost invariably do, and always should, provide that the trustee may in the event of default appoint a receiver, in which case the instrument itself must be referred to for the powers and duties of the receiver. Such power must be exercised *bona fide*, otherwise the Court will appoint its own receiver: *Maskelyne* v. *British Typewriter* (1898) 1 Ch. 133. Unless the power is expressly made exercisable on the property of the company becoming in jeopardy the bondholders must resort to the Court if a receiver is desired to be appointed on such grounds. Unless the trust deed states, as it ought, that the receiver is to be deemed the agent of

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the company, he will be deemed to be the agent of the bondholders, or the trustee, who will, therefore, be liable for any default on his part: *Re Vimbos, Ltd.*, (1901) 1 Ch. 470; *Robinson Printing Co.* v. *Chic, Ltd.* (1905) 2 Ch. 123, where the debenture holders were held to be personally liable for debts incurred by the receiver. This point is important as regards remuneration, for if the receiver is the agent of the bondholders he can claim remuneration from them: *Deyes* v. *Wood* (1911) 1 K. B. 806.

But even where the receiver is the agent of the bondholders he is for some purposes the agent of the company, at all events so far as is necessary to enable him to exercise the powers conferred on him by the debentures, per Warrington, J., in *Robinson* v. *Chic.* (1905) 2 Ch. 123, at p. 132.

Where the receiver is expressly stated to be the agent of the company there is no personal liability of the receiver or trustee for debts incurred in carrying on the business: *Owen* v. *Cronk* (1895) 1 Q. B. 265; *Gosling* v. *Gaskell* (1897) A. C. 575. And, though the receiver's agency ceases if a winding-up occurs, he does not, in the absence of authorization from the bondholders, by continuing to act make the trustee liable as principal, *ibid.*

Receiver appointed by Court.

The position of a receiver appointed by the Court is thus described by Haldane, L.C., in *Parsons* v. *Sovereign Bank* (1913) A. C. 160, at p. 167: "A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture holders whose credit he can not pledge, nor of the company which can not control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him." He is not the agent or manager of the company and can not make contracts on which the company will be liable: *Moss Steamship Co.* v. *Whinney* (1912) A. C. 254; he is a principal and not an agent, per Vaughan Williams, L.J., in *In re Glasdir Copper Mines* (1900) 1 Ch. 365.

As to the receiver's right to be indemnified out of the estate see *In re Glasdir Copper Mines, supra*; *Strapp* v. *Bull* (1895) 2 Ch. 1.

Effect of the appointment on the company.

The appointment of a receiver by the Court leaves the company in existence, but deprives the company of all power to enter into contracts or to alienate, pledge or otherwise dispose of the assets of which the receiver is put in possession. The company's powers are in abeyance: *Moss Steamship Co.* v. *Whinney* (1912) A. C. 254. The appointment of a receiver will ordinarily operate as a dismissal of the company's servants: *Reid* v. *Explosives* (1887) 56 L. J. Q. B. 388; *Rolfe* v. *Canadian Timber, &c., Co.* (1906) 12 B. C. R. 363; but does not put an end to all the company's contracts, *e.g.*, trade contracts.

A receiver having delivered goods to a customer of the company under a contract made by the company before his appointment, assigned the amounts due for such goods to a bank, and afterwards cancelled the contract made by the company. Notice of the assignment to the bank was not given to the customer until after the contract had been cancelled:—Held, that in an action brought by the bank against the customer to recover the debt so assigned the customer was entitled to set off damages sustained by the cancellation of the contract: *Parsons* v. *Sovereign Bank* (1913) A. C. 160.

Duties of the receiver.

The duty of the receiver is to take possession of and protect the assets of the company comprised in the charge: *Manchester* v. *Milford* (1880) 14 Ch. D. 645. He is responsible for negligence in administering the estate and reasonable care and ordinary business control are required: *Plisson* v. *Duncan* (1905) 36 S. C. R. 647. A receiver may under certain circumstances be empowered by the Court to borrow a limited sum on receiver's certificates to be a first charge in priority to the bonds as was done in *Sage* v. *Shore Line* (1901) 2 N. B. Eq. 321. He will not, however, be authorized to make large expenditures where it is not clearly beneficial to the estate; see *Ritchie* v. *Central Ontario Ry.* (1904) 7 O. L. R. 727.

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Since the amending Act of 1917, receivers are required to file certain notices and accounts as provided by s. 69C.

As to duties and powers of receivers see further Kerr on Receivers and the annotation in (1914) 18 D. L. R. 5.

An action by a receiver is properly brought in the name of the company and while it is prudent for the receiver to obtain the Court's sanction to the institution of an action it is not necessary to do so: *Franco-Belgian, &c., Co.* v. *Dubuc* (1918) 41 D. L. R. 711.

Possession of the receiver.

As the receiver is an officer of the court it is a contempt of court to interfere with his possession of the assets of the company; see *In re Maudslay & Sons & Field* (1900) 1 Ch. 602. As to the practice in England with regard to making an order for possession of the company's assets, see *National &c. Bank of England* v. *United Electric Theatres* (1916) 85 L. J. Ch. 106. Where the court appoints a receiver over property out of the jurisdiction he is not put into possession by the mere order of the court, and a person who takes proceedings in the foreign country against the assets is not guilty of contempt: *In re Maudslay & Sons & Field* (1900) 1 Ch. 602.

Proceedings against the receiver.

In *Diehl* v. *Carritt* (1907) 15 O. L. R. 202, leave was given by Riddell, J., to bring an action against the receivers of an Ontario company to restrain them from carrying out a scheme for a fresh bond issue, although the scheme had been upheld on a motion before a judge of the High Court of Justice in England.

Receiver and manager.

The court will in a proper case appoint a receiver to act as receiver and manager. A receiver and manager is empowered to carry on the business of the company for the purpose of realization. The receiver will not be directed to manage the business unless the latter is by express terms or by implication included in the security: *Whitley* v. *Challis* (1892) 1 Ch. 64 (C. A.). The business of the company will be included

in the security if the latter covers the " good will " of the company, and it is important that the trust deed should so provide. The word "property" may be sufficient to include the good will or business of the company: *Salter* v. *Leas Hotel Co.* (1902) 1 Ch. 332; see also *Peek* v. *Transmarin Iron Co.* (1876) 2 Ch. D. 115; *Makins* v. *Percy Ibbotson & Sons* (1891) 1 Ch. 133, and *Edwards* v. *Standard Rolling Stock Syndicate* (1893) 1 Ch. 574, where receivers and managers were appointed where the charge did not in terms include the good will. Sect. 69M.

(7) Modification of rights of bondholders.

It is usual for the trust deed to contain a provision enabling a stated majority at a meeting of bondholders to consent to a modification of the terms of the security. It may be advisable in the interests of the bondholders generally, *e.g.*, to postpone the due date of the principal moneys or waive compliance with sinking fund provisions or to permit the issue of prior lien bonds. The effect of such a provision in the trust deed is in each case a matter of the construction of its terms. Modification of rights of bondholders.

Bondholders may vote to promote their individual interests even though special provision is being made with regard to the bonds held by them, if it is made openly: *Goodfellow* v. *Nelson Line* (1912) 2 Ch. 324. The conversion of redeemable into irredeemable bonds was held to be a " modification " within the meaning of the trust deed in *Northern Assurance Co.* v. *Farnham* (1912) 2 Ch. 125.

See the following cases as to modification of bondholders' rights:—*Bury* v. *Famatima Development Cor. Ltd.* (1910) A. C. 439; *Mercantile Investment and General Trust Co.* v. *River Plate* (1894) 1 Ch. 578; *Sneath* v. *Valley Gold Co.* (1893) 1 Ch. 477; *Follitt* v. *Eddystone &c. Quarries* (1892) 3 Ch. 75; *Shaw* v. *Royce Ltd.* (1911) 1 Ch. 138; *Cox Moore* v. *Peruvian Corporation* (1908) 1 Ch. 604; *Re New York Taxicab Co.* (1913) 1 Ch. 1; *Re B. C. Portland Cement Co.* (1915) 22 D. L. R. 609, affirmed (1916) 27 D. L. R. 726; *Diehl* v. *Carritt* (1907) 15 O. L. R. 202.

Sect. 70. **Dividends.**

Not to impair capital.

70. No dividend shall be declared which will impair the capital of the company. 2 E. VII., c. 15, s. 58.

Debts deducted from dividends.

71. The directors may deduct from the dividends payable to any shareholder all such sums of money as are due from him to the company, on account of calls or otherwise. 2 E. VII., c. 15, s. 59.

Payment of dividends generally.
Procedure.
Payment out of capital.
Accretions to capital.
English decisions.
Distinction between fixed and circulating capital.
Dividends on shares of companies subject to the Act.
Rules.
Liability of directors.
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Reserve fund.

Payment of dividends generally.

Payment of dividends.

The proper fund for the payment of dividends is the excess of the company's earnings over the expenses incurred in obtaining them. But it is obvious that opinions may differ as to the items which ought to be taken into consideration in settling the two sides of the account, the balance of which may be divided as profit.

Dividends may be paid before ordinary current debts: *Stevens* v. *South Devon R. Co.* (1851) 9 Ha. 313; *Corry* v. *Londonderry, etc., Co.* (1886) 29 Beav. 263; before the company's works are finished: *Browne* v. *Monmouthshire Co.* (1851) 13 Beav. 32; where the calculation of profits is based on an exaggerated value of assets: *Stringer's Case* (1867) L. R. 4 Ch. 475; *Rance's Case* (1871) L. R. 6 Ch. 104; before organ-

ization expenses are paid: *Bale* v. *Cleland* (1864) 4 F. & F. 117; *Bardwell* v. *Sheffield Waterworks Co.* (1872) L. R. 14 Eq. 517; where there has been no provision for replacing wasting capital: *Lee* v. *Neufchatel Asphalt Co.* (1889) 41 Ch. D. 1. And where capital expenses have been paid out of income, they may afterwards be charged to the capital so as to increase a dividend: *Mills* v. *Northern Railway of Buenos Ayres* (1870) 5 Ch. 621. Secs. 70-71.

When a dividend is declared and becomes payable it is a debt, and each shareholder is entitled to sue the company for his proportion: *Eastern Railway Co.* v. *Symonds* (1850) 5 Ex. 237, and the Statute of Limitations will bar the shareholders' claims in six years: *Re Severn R. Co.* (1896)1 Ch. 564.

A dividend must be declared before suit can be brought for it even where shares carry a fixed preferential dividend: *Bond* v. *Barrow Haematite* (1902) 1 Ch. 353. As to withdrawal of interim dividend see *Lagunas Nitrate* v. *Schroeder* (1901) 85 L. T. 22.

The mere fact that no dividend is declared by a profit making company is insufficient to warrant an order for an inspection under section 92 of the Act: *Re Sarnia Ranching Co.* (1915) 8 W. W. R. 697.

Where there has been a transfer of shares the transferee is entitled to all dividends declared after the date of his transfer or contract for sale: *Black* v. *Homersham* (1878) 4 Ex. D. 24.

In the absence of express authority dividends must be paid in cash: *Hoole* v. *Great Western Ry. Co.* (1867) L. R. 3 Ch. 262; *Wood* v. *Odessa, etc., Co.* (1889) 42 Ch. D. 645. Dividends cannot be paid by an issue of debentures: *Wood* v. *Odessa Waterworks Co.* (1889) 42 Ch. D. 636, nor by an issue of preference stock: *Hoole* v. *Great Western Ry. Co.* (1868) 3 Ch. 262.

But the shareholders may unanimously agree to accept payment in some other form than cash. A stock dividend is stock distributed to those already holding stock by way of dividend upon their holdings, per Middleton, J., in *Re Fulford* (1913) 14 D. L. R.

Secs. 70-71. 844; 29 O. L. R. 375. See also *Re Crow's Nest Pass Hardware Co.* (1914) 16 D. L. R. 44.

Dividends. Where the governing act forbids the capitalization of surplus earnings in this manner the court, after setting aside the directors' resolution declaring the dividend, will not order the payment of the dividend in money: *St. Lawrence Furniture Co.* v. *Binet* (1915) 24 Que. K. B. 405; 25 D. L. R. 316.

In the absence of provision to the contrary, dividends are payable rateably on the number of shares held, irrespective of the amount paid up thereon: *Oakbank Oil Co.* v. *Crum* (1883) 8 App. Cas. 65. As to apportionment of dividends see R. S. O. (1914) c. 156, s. 4 and similar provisions in other provinces.

Procedure.

Section 80 (b) of the Act empowers the directors to pass by-laws with regard to the declaration and payment of dividends. In the absence of a by-law limiting the power of directors to declare dividends, the shareholders are not entitled to rescind a resolution of the directors declaring a dividend: *Denault* v. *Stewart* (1918) 54 Que. S. C. 209.

Where the shareholders are the proper persons to declare the dividend, a dividend cannot be legally declared at a meeting of directors: *Re Cardiff Coal Co.* (1910-11) 3 A. L. R. 325, and it was held in the same case that the court might find from the inspection of the minutes whether the meeting was one of the shareholders or directors. See also *Karr* v. *South Side Lumber Co.* (1916) 28 D. L. R. 739, on the necessity for following the regulations applicable for the declaration of a dividend.

Payment out of capital.

To pay dividends when there are no profits is to pay them out of capital, and is tantamount to returning so much capital to the shareholders. It " diminishes " or "impairs" the capital within the meaning of s. 95 of the Ontario Act, or s. 70 of the Dominion Act.

Directors, who for fraudulent purposes, and in order to lead shareholders and the public to believe that the affairs of the company are in a favourable position, declare dividends out of profits when there are no profits to pay them, and pay the dividend either out of the capital of the company or out of money borrowed for the purpose, are guilty of a criminal offence, punishable at common law: *Burnes* v. *Pennell* (1849) 2 H. L. C. 497; *R.* v. *Esdaile* (1858) 1 F. & F. 213. Secs. 70-71.

Accretions to capital.

When it is said "that dividends are not to be paid out of capital, the word capital means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realized and turned into money, which may be divided amongst the shareholders:" *Verner* v. *General & Commercial Trust* (1894) 2 Ch. 239. Accretions to capital.

A good statement of the principle is that of Byrne, J., in *Foster* v. *New Trinidad Lake Asphalt Co.* (1901) 1 Ch. p. 212. He says:—

"It is clear, I think, that an appreciation in total value of capital assets, if duly realized by sale or getting in of some portion of such assets, may in a proper case be treated as available for purposes of dividend. This, I think, is involved in the decision in the case of *Lubbock* v. *British Bank of South America* (1892) 2 Ch. 198, cited with approval by Lord Lindley in *Verner* v. *General and Commercial Investment Trust*, (1894) 2 Ch. p. 265, where he says: 'Moreover, when it is said, and said truly, that dividends are not to be paid out of capital, the word "capital" means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realized and turned into money, which may be divided amongst the shareholders, as was decided in *Lubbock* v. *British Bank of South America*.' If I rightly appreciate the true

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effect of the decisions, the question of what is profit available for dividend depends upon the result of the whole accounts fairly taken for the year, capital, as well as profit and loss, and although dividends may be paid out of earned profits in proper cases, although there has been a depreciation of capital, I do not think that a realized accretion to the estimated value of one item of the capital assets can be deemed to be profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken.''

English decisions.

English decisions on whether lost capital must be made up before dividends are paid.

The whole question has been much considered in a number of cases in England, and in *Re National Bank of Wales, Limited,* (1899) 2 Ch. 629, there was a very full discussion of the principles on which the Courts now act. In that case the losses written off in one year were not brought forward the next year so as to diminish the profits of that year, but were simply ignored, a fresh start being made each year, and the dividends being paid out of the excess of the annual receipts over the annual expenses. The effect of this was to throw all bad debts written off and not provided for by an increase of the reserve fund on to the capital; to diminish the paid-up capital year by year, and, nevertheless to keep paying dividends out of the excess of the annual receipts over the current expenses. It is obvious that this method of procedure, if long continued, would ultimately exhaust the paid-up capital of the company, and the first disastrous year in which the current outgoings exceeded the current incomes it would produce great embarrassment. The Court of Appeal said, however: '' Such a mode of dealing with the company's assets, however reprehensible, must nevertheless not be confounded with paying dividends out of the paid-up capital of the company. The paid-up capital of a limited company cannot be lawfully returned to the shareholders under the guise of dividends or otherwise. Even an article of association authorizing the payment of interest to shareholders on

the amounts paid upon their shares cannot authorize a payment of such interest out of capital: see *In re Sharp* (1892) 1 Ch. 154; but paid-up capital which is lost can no more be applied in paying dividends than in paying debts. Its loss renders any subsequent application of it impossible. There was no such dealing with the paid-up capital of the company in this case as to amount to an illegal application of it. Further, it is not possible for the Court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid-up capital is intact. Suppose a heavy unexpected loss is sustained, which must be met if there are assets with which to meet it, the capital, even uncalled capital, must, if necessary, be applied to meet it. Such an application of capital is a perfectly legitimate use of it. There is no law which, in the case supposed, prevents the payment of all future dividends until all the capital so expended is made good. Many honest and prudent men of business would replace a large loss of capital by degrees, and would reduce the dividends, but not stop them entirely, until the whole loss was made good. No law compels them to pay none at all. There are cases in which no honest competent man of business would think of charging particular debts or expenses to capital. Secs. 70-71.

"We are certainly not prepared to sanction the notion that all debts incurred in carrying on a business can be properly permanently charged to capital, and that the excess of receipts over other outgoings can be afterwards properly divided as profit, as if there had been no previous loss. No honest competent man engaged in trade or commerce would carry on business on such a principle. But, excluding cases in which everyone can see that a particular debt or outlay cannot be reasonably charged to capital, it may be safely said that what losses can be properly charged to capital, and what to income, is a matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ. See

Secs. 70-71.

Gregory v. *Patchett* (1864) 33 Beav. 595. There is no hard and fast rule on the subject.

"There can, however, be no doubt that, if the expenses or payments are obviously improperly charged to capital, and are so charged simply to swell the apparent profits, and to make it appear that dividends may properly be declared, dividends declared and paid under such circumstances cannot be treated as legitimately paid out of profits, and can no more be justified than if they were paid out of capital. This was determined in *Bloxham* v. *Metropolitan Ry. Co.* (1868) L. R. 3 Ch. 337, and has been acted upon in many other cases, *e.g.*, *Rance's Case* (1870) L. R. 6 Ch. 104; *In re Oxford Benefit Building and Investment Society,* 35 Ch. D. 502; *Leeds Estate, Building and Investment Co.* v. *Shepherd,* 36 Ch. D. 787; *In re London and General Bank* (No. 2), (1897) 2 Ch. 673.

"It would seeem that Jessel, M.R., inclined to the opinion that a limited company could not pay dividends unless its paid-up capital was kept up. See *In re Ebbw Vale Steel, Iron and Coal Co.* (1876) 4 Ch. D. 827. But no decision has ever gone this length, and in the light of the preceding cases dividends may be paid, even by a limited company, although its normal capital is not kept up."

See also *Lee* v. *Neuchatel Asphalte Co.* (1889) 41 Ch. D. 1.

The case of *Re National Bank of Wales* was affirmed, *sub nom. Dovey* v. *Cory* (1901) A. C. 477, by the House of Lords, but on other grounds, and some doubt was thrown on the correctness of the propositions laid down by the Court of Appeal. The Court of Appeal has, however, recently followed *Re National Bank of Wales* and the earlier cases in *Ammonia Soda Co.* v. *Chamberlain* (1918) 87 L. J. Ch. 193; (1918) 1 Ch. 266. There a company at one time had a large amount standing to debit of profit and loss which arose by debiting (at a time when the company's gross trading profit was insufficient to provide the same) certain sums for depreciation of buildings, plant and machin-

Ammonia Soda Co. v. Chamberlain.

ery during a certain period. There was no evidence of any actual depreciation of these items during the period. There were also debited large sums for directors' fees, mortgage and debenture interest. The effect of this debit was to indicate on the books of the company that the capital was impaired.

By a revaluation of the premises, made honestly and in good faith by the directors, the amount at which the company's land stood in the balance sheet was largely increased, with the result that a credit was created which would have enabled the previous debt to be written off. Part of this was written off out of the new credit and part out of subsequent net profits. The directors regarded the debit as extinguished and in subsequent years paid dividends which were less in amount than the net profits which were made in those years. In an action by the company against the directors to make them refund these dividends on the ground that the profits of subsequent years must in the first instance be applied to replace the previous loss, it was held that this need not be done, that the dividends were not paid out of capital but out of profits and that the directors were under no liability to repay the same. See also *Lawrence* v. *West Somerset Mineral Railway* (1918) 2 Ch. 250.

Distinction between fixed and circulating capital.

Distinction between fixed and circulating capital.

A distinction has been drawn in the cases between "fixed" and "floating" or "circulating" capital on which the most recent statement is that contained in *Ammonia Soda Co.* v. *Chamberlain, supra.* There Swinfen Eady, L. J., (87 L. J. Ch. 202; (1918) 1 Ch. 266) said:

"What is fixed capital? That which a company retains in the shape of assets upon which the subscribed capital has been expended, and which assets either themselves produce income independent of any further action by the company, or, being retained by the company, are made use of to reproduce income or gain profits." . . . "What is circulating capital? It is

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a portion of the subscribed capital of the company intended to be used by being temporarily parted with and circulated in business, in the form of money, goods or other assets, and which, or the proceeds of which, are intended to return to the company with an increment, and are intended to be used again and again, and to always return with some accretion."

The bearing of the distinction on the question of dividends is stated at the same page as follows:

"The terms 'fixed' and 'circulating' are merely terms convenient for describing the purpose to which the capital is for the time being devoted, when considering its position in respect to the profits available for dividend. Thus, when circulating capital is expended in buying goods which are sold at a profit, or in buying raw materials from which goods are manufactured and sold at a profit, the amount so expended must be charged against, or deducted from, receipts before the amount of any profits can be arrived at." And the same distinction is stated in *Verner* v. *General and Commercial Investment Trust* (1894) 2 Ch. 239 at p. 266, where Lindley, L.J., said, "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law."

In *Bond* v. *Barrow Haematite Steel Co.* (1902) 1 Ch. 353, Farwell, J., (as he then was) extended the above rule to a realized loss in respect of leasehold iron mines held by the company for the purpose of supplying themselves with ore, which he regarded as circulating capital which must be made up before any dividend could be paid.

Dividends on shares of companies subject to the Act. Secs. 70-71.

Dividends on shares of companies subject to the Act.

Where there is a prohibition against paying any dividend "which will impair the capital of the company" such as is contained in s. 70, the foregoing authorities to the effect that dividends may be declared out of profits without restoring lost capital have been said to be inapplicable: *Stavert* v. *Lovitt* (1907-8) 42 N. S. R. 449, 487; *Colonial Assurance Co.* v. *Smith* (1913) 12 D. L. R. 113, 122. *Sed quære,* for the statute does not impose any obligation on the directors to restore capital lost, nor does it forbid the payment of any dividend *while* the capital is impaired. See also 33 Can. L. J. p. 94.

Profits.

Dividends may not be paid except out of profits —nor except out of divisible profits.

What are profits?

As regards circulating capital the solution, though not always easy as a matter of evidence, is perfectly clear as a matter of law. See cases above cited.

With respect to fixed capital there is no hard and fast rule. Every case must depend on its own facts. An increase in the value of fixed assets will not easily be treated as profit, for it may disappear in the same way as it arose, and, conversely, depreciations in the value of fixed assets need not always be restored before paying dividends out of trading or other profits really earned by the company—but in such circumstances directors should, to fulfil their legal obligations, act not only honestly but conservatively.

Rules.

It is submitted that if directors desire to protect themselves against proceedings for wrongfully declaring dividends they should observe the following rules.

(1) Create a reserve fund for unexpected losses; set aside proper amounts annually for depreciation of buildings and plant, for replacing wasting assets, for bad and doubtful debts.

(2) Refrain from paying dividends unless the company's operations show a profit according to what is

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described by Palmer Precedents, 11th ed. 875, as the "single account" system which works out as follows:— The paid-up capital is treated as a liability. A balance sheet is made up showing the profit or loss during the period, showing on the credit side all the assets and on the debit side all liabilities, including paid-up capital and all losses and depreciation. The balance to the credit or debit of profit and loss, after adding or deducting the credit or debit balance carried forward from the previous year, shows the surplus assets or profits, or the deficit or amount of the impairment of capital.

The accuracy of the result of such a system depends on the correctness of the valuation assigned to the various assets of the business, such as lands, plant, patents, good will, &c. The value of lands and buildings is usually fixed at cost and an annual sum written off for depreciation; and it is obvious that as regards fixed capital a company which does not propose to dispose of, *e.g.*, plant or buildings is not concerned to show fluctuations in the value thereof in its annual statements. As regards circulating capital the dangers of overvaluation may be illustrated from *Re Owen Sound Lumber Co.* (1917) 33 D. L. R. 487 at pp. 495 ff.

For a discussion of the modes of ascertaining profits and methods of valuation see *In re Spanish Prospecting Co.* (1911) 1 Ch. 92.

(3) If there has been a large loss so that the company's capital is seriously impaired and the impairment can not be made good out of profits within a reasonable time the capital should be reduced under s. 54 of the Act.

It is doubtful whether the directors of a company governed by the Act whose assets are of a wasting character, *e.g.*, a mining company, can safely authorize the payment of dividends without setting aside a fund to provide against the exhaustion of the assets. In Ontario an amendment of the Companies Act was passed in 1913, which now appears as s. 95 of R. S. O. (1914) c. 178, expressly in order to give the directors

of a company protection in such a case. Where such a company pays dividends without making provision for the exhaustion of wasting assets it would be prudent for the directors to draw the attention of the shareholders to that fact in the notices accompanying the dividend cheques. Secs. 70-71.

Liability of directors for dividends improperly declared.

Section 82 of the Act imposes on the directors responsible for the payment of a dividend contrary to the provisions of the section a joint and several liability to the company, the individual shareholders, and the company's creditors for all debts of the company then existing, and for all debts thereafter contracted during their continuance in office respectively. Liability of directors.

Apart from the act directors who pay a dividend out of capital are bound to make it good personally on being sued by the company: *Oxford Benefit Building Society* (1887) 35 Ch. D. 502. They may also be proceeded against by way of misfeasance summons in a winding-up under s. 123 of the Winding-Up Act R. S. C. 144, cf. *Re Owen Sound Lumber Co.* (1916-17) 38 O. L. R. 414; *Stavert* v. *Lovitt* (1907-08) 42 N. S. R. 449. See also *Re Metropolitan Theatres Ltd.* (1919) 16 O. W. N. 241. Action may also be brought by a shareholder against a director who has authorized the payment of an illegal dividend, but in such a case a shareholder who has received and retained his share of the dividend knowing that it involved a repayment of capital is personally incompetent to maintain the action: *Towers* v. *South African Tug Co.* (1904) 1 Ch. 558; *Crawford* v. *Bathurst Land &c. Co.* (1916) 37 O. L. R. 611; and he is in no stronger position because he sues on behalf of himself and other shareholders, *ibid.*

An illegal dividend can not be ratified by the shareholders: *Crawford* v. *Bathurst Land &c. Co.* (1916) 37 O. L. R. 611. Liability of directors for dividends illegally declared.

Directors who are not wilfully inattentive to duty are not liable for having declared a dividend which

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impairs the company's capital if they have done so through accepting incorrect statements of the company's officials: *Re Owen Sound Lumber Co.* (1917) 33 D. L. R. 487; 38 O. L. R. 414. They are not bound to investigate the accuracy of the statements put before them: *Owen Sound Lumber Co., supra; Dovey* v. *Cory* (1901) A. C. 477 at p. 485. Directors of a bank are not bound to examine its books, but if anything arises to suggest the need of enquiry it is their duty to obtain full explanation and if they retain an official after they are aware of his improper conduct involving the resources of the bank they are liable for his subsequent acts: *Stavert* v. *Lovitt* (1907-08) 42 N S. R. 449

The liability of a director on a misfeasance summons under s. 123 of the Winding-up Act is the same whether he has been regularly appointed or not: *Owen Sound Lumber Co.* (1917) 33 D. L. R. 487; (1916-7) 38 O. L. R. 414. Where a director is proceeded against under this section he is liable only for the amount whereby the dividends have depleted the capital, *ibid.* and see the report *Re Owen Sound Lumber Co.,* 33 D. L. R. *supra,* at pp. 503 and 504, for the difficulty which sometimes exists in ascertaining the amount whereby capital has been reduced. See also *Northern Trust* v. *Butchart* (1917) 35 D. L. R. 169. Sometimes there is no difficulty in determining the measure of the directors' liability. Thus where a land company sold its lands at a net profit of $25,003.72, but the directors distributed $36,024, the excess of such sum over the net profit was a payment out of capital: *Crawford* v. *Bathurst Land Co.* (1916) 37 O. L. R. 611, 622. It was held in the same case that the directors in ascertaining the profit were entitled to treat a third mortgage received by the company from the purchaser for $50,851.13 as being good, having regard to the fact that the purchaser had actually paid in cash on the purchase $50,000, and to declare a dividend to the extent of the profit so shown.

There was no appeal on the question of dividends. See (1918) 42 O. L. R. 256, 260. But the point is further considered in the reasons for judgment of Duff, and Anglin, JJ., on the further appeal on other

branches of the case to the Supreme Court of Canada, (1920) 50 D. L. R. 457. Secs. 70-71.

Where the president of a company wilfully misrepresented the earnings to the directors so as to induce them to declare dividends not warranted by the actual earnings, he was held to be liable in damages to the company, even though the payment was not out of the fixed capital and was not *ultra vires*. The fact that the shareholders had received the dividends was immaterial where the company was bringing the action, for if the moneys had not been paid out the working capital of the company would have remained larger or its indebtedness have been less: *Northern Navigation Co.* v. *Long* (1906) 11 O. L. R. 230.

See further the notes to s. 80 and to s. 123 of the Winding-up Act.

Position of shareholders.

Position of shareholders.

A shareholder who takes a dividend not knowing that it is paid out of capital is not bound to return it: *Flitcroft's Case* (1882) 21 Ch. D. 519; *In re Denham* (1884) 25 Ch. D. 752. But if he does know that it is paid out of capital the company can get it back: *Crawford* v. *Bathurst Land &c. Co.* (1916) 37 O. L. R. 611. Similarly the liquidator can recover dividends improperly declared, at any date where the shareholder can not plead good faith: *Hyde* v. *Scott* (1919) 47 D. L. R. 260, 267.

Where a dividend has been declared when the company is insolvent the application thereof in payment of shares in full will not be allowed and on a winding-up the shareholders are not entitled to any credit in respect thereof: *Re Northern Constructions Ltd.* (1910) 19 Man. L. R. 528.

Preference shares.

Preference shares.

The dividend on preference shares depends on the terms of the issue, and such terms may be found in the letters patent or in the by-laws. See *Ashbury* v. *Watson* (1885) 30 Ch. D. 376: *Webb* v. *Earle* (1865) L. R. 20 Eq. 556.

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One advantage of defining the rights of preference and other shareholders in the petition and of having them inserted in the letters patent is to fortify the position of the respective classes, for rights unconditionally attached by the letters patent to a particular class of shares cannot be altered or infringed: *Ashbury* v. *Watson, supra.* See note on Preference Shares, *supra.*

Every infringement or attempted infringement of the rights of a preference shareholder will be restrained by injunction and the fact that the owner of preference shares may have for years asquiesced in the declaration of a dividend on the ordinary shares while there was an arrear of dividend due on the preference shares, will not deprive him of his right in respect of subsequent arrears though it will preclude him from making any claim in respect of these particular arrears: *Matthews* v. *Great Northern Railway Co.* (1859) 28 L. J. Ch. 375, and see also *Leeling* v. *Insurance Co.,* 45 Barb. 510.

Bonus.

"Bonus may be described as whatsoever comes from a fund accumulated during several preceding years for any purpose, and ultimately found unnecessary for the ordinary payments, or grown so large as not to be capable of being dealt with in the usual way; if that be paid to the shareholders in addition to the dividend, I should say that was a bonus." Kindersley, V. C., in *Hollis* v. *Allan* (1866) 14 W. R. 980.

Tenant for life.

As between the tenant for life and the remainderman of shares which have been settled by deed or will, the principle is that the tenant for life takes all dividends and bonuses declared in his lifetime: *Price* v. *Anderson* (1847) 15 Simons 473; *Hopkins' Trust* (1874) L. R. 18 Eq. 696; *Armitage* v. *Garnett* (1893) 3 Ch. 337; *Malam* v. *Hitchens* (1894) 3 Ch. 578.

But where the dividend is paid in shares it may be regarded as being capitalized, and in this case the

tenant for life cannot claim it as income: *Bouch* v. *Sproule* (1887) 12 App. Cas. 385; *Barton's Trust* (1888) L. R. 5 Eq. 238. Secs. 70-71.

The exercise of the company's discretion in distributing profits as dividends or converting them into capital is binding on both the remainder-man and the tenant for life: *Bouch* v. *Sproule, supra.*

What a company says is income shall be income, and what it says is capital shall be capital: *Re Bouch* (1885) 29 Ch. D. 659; and the question whether profits remain income or have been capitalized is in each case a question of fact. *ibid.* See also *In re Piercy* (1907) 1 Ch. 289.

But the mere fact of moneys being taken from undivided profits and carried to a reserve fund has been considered not equivalent to their capitalization: *Re Bridgewater Navigation Co.* (1891) 2 Ch. 317; but see *Fisher* v. *Black and White Publishing Co.* (1901) 1 Ch. 174.

The time when the profits were earned by the company is immaterial as between the tenant for life and remainder-man. Their rights have been made dependent on the legitimate acts of the company, and subject to the law of apportionment, are determined by the time not at which the profits are earned by the company but by the time at which they are by the action of the company made divisible amongst its members: *Re Bouch* (1885) 29 Ch. D. 659; see also *Dale* v. *Hayes* (1871) 40 L. J. Ch. 244; *Maclaren* v. *Stainton* (1861) 3 D. F. & J. 202; *In re Ogilvie* (1919) 88 L. J. Ch. 159; *In re Thomas* (1916) 2 Ch. 331.

However, in certain cases another principle may be applied, viz., that when executors delay realizing company shares so as to nurse a doubtful asset, and this operates to deprive the life tenant of his income in the meantime, the whole loss can not be thrown either upon capital or income, but must be distributed between capital and income: *Re Leys* (1911-12) 3 O. W. N. 464, per Middleton, J. and see *In re Atkinson*

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(1904) 2 Ch. 160: *Hibbert* v. *Cooke* 1 Sm. & Stu. 552; *In re Bird* (1901) 1 Ch. 916.

The effect of the Apportionment Act in respect of dividends declared after the death of a tenant for life, but declared for a period entirely prior to the death of the tenant for life, is to make such dividends fall into the estate of the tenant for life: *In re Muirhead* (1916) 2 Ch. 181; 85 L. J. Ch. 598.

Reserve fund.

"Such a fund is a very common feature in well managed and prosperous companies of all kinds, and it consists of moneys made or saved as a result of their operations from year to year and not paid out in dividends to their shareholders. Instead of being left as a floating balance at the credit of profit and loss account, it is transferred to another account and called the rest account or reserve account or surplus; but, under whatever name it may exist, it is simply the company's current surplus of assets over liabilities, treating the paid up capital as a liability," per Street, J., in *Toronto* v. *Consumers' Gas Co.* (1903) 5 O. L. R. 494 at p. 499-500.

A reserve fund may consist of goods as well as money: *Gignac* v. *Gignac & Cie.* (1910) Que. 37 S. C. 174, per Lemieux, J., at p. 184.

The directors of a company, in the absence of provisions to the contrary in the letters patent or by-laws, and subject to the control of the shareholders, are entitled to maintain a rest or reserve fund and are not bound to distribute the whole of the profits among the shareholders. The reserve fund may lawfully be invested in such securities as the directors may select, subject to the control of a general meeting of the shareholders, and it is not *ultra vires* for a company to invest its profits in the name of a sole trustee, who will be strictly accountable for all investments held by him. If the directors prefer to do so, subject to the control of the shareholders, they may retain the profits as an undivided fund standing at the credit of profit and loss, or appropriate them to any other use of the

company: *Burland* v. *Earle* (1902) A. C. 83; *City of Toronto* v. *Consumers' Gas Co.* (1903) 5 O. L. R. 494; *Kennedy* v. *Acadia Pulp, &c., Co.* (1905) 38 N. S. R. 291. Secs. 70-71.

The Court has no jurisdiction to control the decision of the shareholders as to the propriety of retaining profits undivided; nor will the Court interfere to say what is a fair or reasonable sum to retain undivided or what reserve fund may properly be required: *Burland* v. *Earle* (1902) A. C. 83, at p. 95. And in that case it was held that a minority of the shareholders could not prevent the directors who held control from retaining a very large sum as a reserve fund.

No doubt, if it could be shown that the directors were not acting *bona fide* either in maintaining an inordinate reserve fund or in their investment of it, a shareholder could claim the intervention of the Court. See the observations of Lord Davey in the same case at p. 97 of the report. In *Bond* v. *Barrow Haematite Co.* (1902) 1 Ch. 353, Farewell, J., at p. 368, observes that it would be a very strong measure for the Court to override the discretion of the directors and compel them to pay a dividend which they thought the state of accounts did not justify.

Preference shareholders have no right to object to the setting aside of a reserve fund even when their shares carry a fixed cumulative dividend: *Bond* v. *Barrow Haematite Co.* (1902) 1 Ch. 353, 362. If the preference dividend be non-cumulative the relative rights of the common and preference shareholders may be seriously affected by the exercise of the directors' discretion in the matter of the amount of the reserve fund. For the fund set apart may leave the balance of divisible profits insufficient to pay the full preference dividend, thereby increasing the surplus available for dividends on ordinary shares in future years.

Where there is more than one class of shareholders " it will be the duty of the directors to fix the amount of the fund retained with reference to the general interest of all classes of shareholders, and not to favor

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any one class at the expense of the others," per Lord Cranworth, L.C., in *Henry* v. *Great Northern Ry. Co.* (1857) 1 De G. & J. 606, at p. 638.

See also as to the duty of directors in determining the amount of surplus profits available for the distribution of dividends the observations of Britton, J., in *Leslie* v. *Canadian Birkbeck Co.* (1913) 10 D. L. R. 629.

Directors.

Board of directors.

72. The affairs of the company shall be managed by a board of not less than three directors." (1918, 8-9 Geo. V., c. 13, s. 2).

Such a provision as the above is imperative and not merely directory. A board of less than three can not carry on the business of the company; so a call made or a forfeiture declared by less than the specified number of directors is invalid: *Alma Spinning Co., Bottomley's Case* (1880) 16 Ch. D. 681. The point is also discussed in *Re Bank of Syria* (1901) 1 Ch. 115, where the articles provided that the continuing directors might act notwithstanding any vacancy. The section does not affect the right of the company under s. 76 to increase the number of directors nor the right of the directors under s. 80 (e) to pass by-laws for fixing a quorum. So where the by-laws provide for a board of seven with a quorum of four, and four directors cease to be qualified, the remaining three have no power to fill vacancies under s. 78 (c): *Sovereen* v. *Whiteside* (1906) 12 O. L. R. 638. Where there is no quorum under the by-laws no business can be carried on by the remaining directors: *Sovereen* v. *Whiteside, supra; Manes Tailoring Co.* v. *Willson* (1907) 14 O. L. R. 89, 96, where the number of the board was reduced without carrying out the necessary proceedings in that regard. See also *Toronto Brewing and Malting Company* v. *Blake* (1882) 2 O. R. 175; *Twin City Oil* v. *Christie* (1909) 18 O. L. R. 324. But the presence on the board of directors of some who are not qualified at the time of their election is not sufficient to invalidate the acts of the board if done by a legal quorum of properly

elected directors: *Morden* v. *Heckels* (1908) 17 Man. L. R. 557. Sect. 72.

Where the board has been reduced below the statutory minimum or there is no quorum under the by-laws a meeting may be convened under s. 87 of the Act for the purpose of filling the vacancies. See *Sovereen* v. *Whiteside* (1906) 12 O. L. R. 638.

73. The persons named as such, in the letters patent, shall be the directors of the company, until replaced by others duly appointed in their stead. 2 E. VII., c. 15, s. 61. Provisional directors.

In England it has never been the practice to appoint what are described as provisional directors: *Michie* v. *Erie & Huron Ry. Co.* (1876) 26 U. C. C. P. 566, at p. 573.

The Canadian Joint Stock Companies Act (1874) 37 Vict. c. 35, s. 19, provided for the appointment of provisional directors, and the clause has been carried into the later letters patent Acts. In the earlier Acts incorporating railway companies it was not usual to appoint provisional directors, but a date was named for the meeting of shareholders at which directors were elected: *London and Gore Ry. Act*, 4 Wm. IV. c. 29. Provision was made for the appointment of provisional directors for the first time in the Consolidated Railway Act (1888) c. 29, s. 33.

Powers of provisional directors.

(1) Generally.

The broad general principle to be borne in mind is that the powers of provisional directors can be ascertained only by construing the words of the governing statute.

The question of the powers of provisional directors was first considered in *Re North Simcoe Ry. Co. & Toronto* (1875) 36 U. C. Q. B. 101. Gwynne, J., at p. 119 there expressed as his opinion that the powers of provisional directors were confined to putting the act of incorporation into operation until the amount necessary to enable the company to elect regular directors

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was subscribed, whereupon the duties of the provisional directors ceased. This case was affirmed on appeal, but the question of the powers of provisional directors was not an issue on the appeal. See also *In re London, &c., Ry. Co. & Township of E. Wawanosh* (1875) 36 U. C. Q. B. 93.

Powers of provisional directors.

Hagarty, C.J.C.P., in *Michie* v. *Erie & Huron Ry. Co.* (1876) 26 U. C. C. P. 566, goes into the subject more fully. "From this we gather that the meaning of the term 'provisional directors' is that they are to perform certain limited and temporary functions existing merely until the complete machinery provided by law may be provided; that it was not the intention of the legislature to give them as much power as was given to directors elected by the shareholders; that their duties were limited to purposes of organization, to opening stock books and dealing with subscriptions and upon the necessary amount being subscribed and paid up to call a general meeting of the shareholders, whereupon their duties would cease, and that the 'working up' of bonuses and incurring large expense in doing so was not within their powers as conferred by the special Act there under consideration. They must not derive any personal advantage from their office and are to create no unnecessary burden for those who subscribe for shares." In this judgment Gwynne and Galt, JJ., concurred. See *Re North Simcoe & Toronto* (1875) 36 U. C. Q. B. 101; *Peterborough* v. *Grand Trunk* (1859) 18 U. C. Q. B. 220; *Maclaren* v. *Fisken* (1881) 28 Gr. 354; *Wilson* v. *Ginty* (1878) 3 A. R. 124; *Denison* v. *Leslie* (1879) 3 A. R. 536, and *Norwich* v. *Attorney-General* (1865) 2 E. & A. 541, which followed *Michie* v. *Erie & Huron, supra.*

No provisional director can bind the company by his representations or agreements. A provisional director cannot bind the company by agreeing that a subscriber for stock shall have to pay his subscription only if the company fulfils certain conditions: *Wilson* v. *Ginty* (1873) 3 A. R. 124.

In *O'Dell* v. *Boston & Nova Scotia Coal Co.* (1896) 29 N. S. R. 385, it was decided that provisional direc-

tors might discharge employees, that forming part of the usual duties of management; and in *Adair* v. *British Crown, &c., Co.* (1915) 24 D. L. R. 905, that provisional directors may secure stock subscriptions through agents. Sect. 73.

Where an Act creating a company required that it should not commence operations until fifty per cent. of its capital had been paid up it was held that this did not prevent the provisional directors from proceeding to allot stock and collect calls or do any other act within their power short of actual operation of the company: *North Sydney, &c., Coal Co.* v. *Greener* (1898) 31 N. S. R. 41.

Where a person was employed by one of the provisional directors of a company to do certain work on behalf of the company in advertising and promoting its undertaking, and it was shown that such provisional director was entrusted by the company with the duty of promoting and furthering the undertaking and that he did so from time to time without any specific instructions from his co-directors at formal meetings of the board, but that they were fully cognizant of what he did and allowed him to transact the business of the company without interference from them, it was held that the person employed was entitled to recover from the company for the value of his work: *Allen* v. *Ontario & Rainy River Ry. Co.* (1898) 29 O. R. 510; *Wood* v. *Ontario* (1874) 24 U. C. C. P. 334, disapproved and *Mahoney* v. *East Holyford* (1875) L. R. 7 H. L. 869, followed.

Where a company was incorporated by special Act and among the powers conferred on the provisional directors was the following, "and may do generally what is necessary to organize the company," it was held that the provisional directors had no right to purchase a subscriber's mortgage and apply part of the purchase price to calls on shares. It was also laid down that in the absence of special provision provisional directors have no power to delegate their powers to committees: *Monarch Life Assurance Co.* v. *Brophy*

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(1906) 14 O. L. R. 1, or make a contract for hire of services of a medical examiner for the whole duration of the company's existence: *Lebel* v. *Security Life Insurance Co.* (1915) 47 Que. S. C. 238.

Powers of provisional directors.

See also for the powers of provisional directors under the Bank Act as it stood at the date of the decisions: *Re Monarch Bank* (1910) 22 O. L. R. 516; *Re Monarch Bank of Canada* (1914) 32 O. L. R. 207.

The provisional directors of a company acquire no rights or interests in the charter capable of sale; company charters are *extra commercium* and where a company is incorporated by special Act there is the further rule that it is a matter of public policy that Acts of the legislature should not be the subjects of purchase and sale: *Vipond* v. *Robert* (1908) Que. 17 K. B. 403.

But it has been held under the special authority there conferred that provisional directors of a railway could sell the whole undertaking: *Minister of Railways and Canals* v. *Quebec Southern* (1908-9) 12 Can. Ex. Ct. Rep. 153.

The powers of provisional directors must be determined solely on the language of the governing statute: *Selkirk* v. *Windsor* (1901) 21 O. L. R. 109, affirmed 22 O. L. R. 250; *Monarch Life* v. *Brophy* (1906) 14 O. L. R. 1.

From the decisions referred to above the following conclusions regarding the powers of provisional directors may be drawn.

Conclusions.

1. The sole test for the powers of provisional directors is to be found in the words of the statute under which the company is incorporated. Their powers are co-extensive with the language employed, but in no case can exceed the powers so conferred.

2. If, as is sometimes the case, for example with banks, the company is incorporated under a special Act, passed in pursuance of a general Act, the special Act must be read in the light of the general governing Act. The special Act may supplement the powers given under the general Act, but only in so far as such powers

do not contravene the principles stated in the general Act.

3. It would also seem to be possible for letters patent to specify certain powers so long as such powers do not exceed what was the plain intent of the general Act to confer.

(2) Under the Act.

The first directors appointed by the letters patent, although called provisional directors, are, until replaced, directors of the company with all the powers and duties of permanent directors, except that they can not without incurring personal liability commence operations before ten per cent. of the authorized capital of the company has been subscribed and paid for, s.s. 26 and 86.

There is nothing in the Act to indicate that the authority of the provisional directors is only temporary or limited: *Muldowan* v. *German Canadian Land Co.* (1909) 19 Man. R. 667.

It is immaterial that no proceedings have been taken to organize the company: *Campbell* v. *Taxicabs* (1913) 27 O. L. R. 141, no by-laws passed, nor directors elected, or that the company has commenced operations in violation of s. 26; and the company will be bound by a contract for sale of land signed on its behalf by one of the persons named in the letters patent as the provisional directors representing himself, with the acquiescence and knowledge of the directors, to be the general manager: *Muldowan* v. *German Canadian Land Co.* (1909) 19 Man. R. 667.

In *Johnston* v. *Wade* (1909) 17 O. L. R. 372, MacMahon, J., the trial judge, who was affirmed by the Court of Appeal, thought provisional directors under a corresponding section of the Ontario Act had the full powers of permanent directors. In the Court of Appeal Osler, J.A., upheld the judgment substantially for the reasons given in the Court below. Meredith, J.A., at p. 389, said: "What right has this or any other Court to interpose a limit which the Legislature has not seen fit to impose; and, if it had, where would the

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line be drawn; would it rest upon the notions of Judge, or Court, in which there might be an entire lack of experience and practical knowledge on the subject?" And the learned judge expressed the opinion that provisional directors had power to pass a borrowing by-law; MacLaren, J.A., concurred in the judgment of Meredith, J.A. Moss, C.J.O., at p. 381, was not prepared to assent to the view of MacMahon, J., and Garrow, J.A., dissenting, expressed the view that provisional directors had no such power. It may also be noted that in *Re Wakefield Mica Co.* (1906) 7 O. W. R. 104, Moss, C. J. O., delivering the judgment of the Court, while holding that it was not necessary for the purpose of the decision to discuss fully the extent of the authority of provisional directors, leaned to the view that as provisional directors were required by s. 16 of the Ontario Companies Act, R. S. O. 1897, c. 191, to call a meeting within two months from the date of the letters patent for the purpose of organizing the company for the commencement of business, they had no power to deal with the issue and transfer of stock. These important matters he said were usually dealt with by the by-laws duly passed by a properly elected board of directors and confirmed by the shareholders. The Dominion Act contains no provision corresponding to s. 16 of the Ontario Act. See also *Perrins, Ltd.* v. *Algoma Tube Works* (1904) 8 O. L. R. 634.

Termination of functions.

The functions of the provisional directors come to an end upon the election of the permanent directors: *MacDonald* v. *McBeth,* 11 U. C. C. P. 224, 228, and they can then no longer bind the company: *North Sydney* v. *Greener* (1898) 31 N. S. R. 41. Apparently the provisional directors are not entitled to lay down their office before the election of permanent directors. Where a special Act made certain persons first directors "to continue in office until the first ordinary meeting held after the passing of the Act" it was held that the Act imposed upon such persons the statutory obligation of continuing directors until the first ordinary

meeting: *In re South London Fish Market Co.* (1888) 39 Ch. D. 324. Sect. 73.

Procedure.

Provisional directors must proceed regularly in the manner prescribed by the Act, and if they meet without proper notice having been given or attempt to transact business without a quorum their acts will be invalid: *McLaren* v. *Fisken* (1881) 28 Gr. 352.

The board of provisional directors must be replaced by an equal number of permanent directors. See *Re Carpenter, Ltd., Hamilton's Case* (1915-6) 35 O. L. R. 626. If it is desired to make the number of the permanent directors different from that of the provisional board the procedure laid down in s. 76 must be followed. A by-law must be passed and ratified by the shareholders and a copy of the by-law deposited in the Department and published in the *Canada Gazette*. See *Manes Tailoring Co.* v. *Willson* (1907) 14 O. L. R. 89, 96; also *Re Carpenters, Limited, Hamilton's Case* (1915-16) 35 O. L. R. 626, (1916) 29 D. L. R. 683, a case decided under R. S. O. 1914, c. 178, s. 83, which explicitly provides that the number of permanent directors to be elected to replace the provisional board must be the same.

Death of provisional directors.

In *Vipond* v. *Robert* (1908) Que. 17 K. B. 403, Bossé, J., thought that as almost all the provisional directors had died the company was virtually extinct and that for this reason the Quebec Legislature by 7 Ed. VII. c. 47, R. S. Q. 1909, Arts. 5964, 6062 enacted a provision whereby the heirs or assigns of deceased provisional directors may call a meeting of shareholders for the election of directors. It is submitted, however, that as the provisional directors are shareholders, and section 3 (d) of the Act defines shareholders so as to include the personal representatives of shareholders, such personal representatives under the authority of sections 74 and 87 of the Act could meet and elect a permanent board.

Failure to elect directors, how remedied.

74. If, at any time, an election of directors is not made, or does not take effect at the proper time, the company shall not be held to be thereby dissolved; but such election may take place at any subsequent special general meeting of the company

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Apart from statute or by-law it would seem to be implied that the directors of the company should hold office until their successors be duly elected and qualified. This is an application of the rule in respect of ordinary trustees. Nor would the failure to elect directors work a dissolution of the company *ipso facto* at common law: *People* v. *Runkle* (1812) 9 Johns (N.Y.) 147; *Hicks* v. *Borough of Lanceston,* 1 Rolle Abr. 514. See also *In re Consolidation Nickel Mines* (1914) 1 Ch. 883.

Special general meeting.

General meetings are held periodically at appointed times for the transaction of general business, *e.g.,* annual meetings; special meetings are held for the transaction of particular business, *e.g.,* for ratifying a borrowing by-law. The term "special general meeting" accordingly would seem to be a misnomer, for such a meeting would not be held periodically at appointed times; see *Austin Mining Co.* v. *Gemmell* (1886) 10 O. R. 696, at p. 703. See also *Christopher* v. *Noxon* (1883) 4 O. R. 672.

Where no election of directors has taken place at the proper time, *i.e.,* the annual meeting, the meeting provided for in the above section may be called by requisition of one-fourth in value of the subscribed stock under s. 87: *Austin* v. *Gemmell* (1886) 10 O. R. 696; see also *Sovereen Mitt, &c., Co.* v. *Whiteside* (1906) 12 O. L. R. 638. Where directors are not elected at the end of their term and a vacancy occurs they can not fill it under s. 78 (c) for the intervening period until an election is held. Any election in such case must be by shareholders, per Moss, C.J.A., in *Kiely* v. *Kiely* (1878-9) 3 A. R. 438, at p. 443.

Qualifications of directors elected.

75. No person shall be elected as a director or appointed as a director to fill any vacancy unless he is a shareholder, owning stock absolutely in his own right, and to the amount required by the by-laws of the company, and not in arrear in respect of any call thereon. 2 E. VII., c. 15, s. 63.

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Restrictions on appointment or advertisement of director.

(2) A person named as a director or proposed director in any prospectus, or in any notice in lieu of prospectus, issued by or on behalf of the company, shall not be capable of being appointed director of the company unless, at the time of the publication of the prospectus, he has by himself or by his agent authorized in writing,—

(i) Signed and filed with the Secretary of State of Canada a consent in writing to act as such director; and,

(ii) Either signed the petition for incorporation and memorandum of agreement and stock book for a number of shares not less than his qualification (if any) or signed and filed with the Secretary of State of Canada a contract in writing to take from the company and pay for his qualification shares (if any). 7-8 Geo. V., 1917, c. 25, s. 10.

The effect of the section is to make the possession of the qualification a condition precedent to election, and if the person elected does not possess the qualification he does not become a director *de jure*: *Jenner's Case* (1876) 17 Ch. D. 132.

A director must hold at least one share: *Re Haggart & Co.* (1892) 19 A. R. 582, 587. If the by-laws of the company make the holding of a greater number of shares necessary their provisions must be complied with. By-laws respecting the share qualification of directors may be made by the directors under the authority of section 80 (c) of the Act, and such by-laws remain in force only until the next annual meeting of the company unless they are in the meantime confirmed at a general meeting.

It has been held by the Court of Appeal in Manitoba that a board of directors, some of whom are only directors *de facto* by reason of want of qualification, may carry on the affairs of the company so long as there is a legally elected quorum and that quorum acts: *Morden* v. *Heckels* (1908) 17 Man. L. R. 557.

Subsequent registration as a shareholder will not re-establish in his office a director previously disqualified: *Sutton* v. *English & Colonial* (1902) 2 Ch. 502; and see *Channel Collieries Trust* v. *St. Margaret's, &c., Light Ry.* (1915) 84 L. J. Ch. 28, 33.

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In his own right.

The meaning of the words "in his own right" has not, as might be expected, been held to imply a beneficial holding, but it has been considered sufficient that a director holds shares as trustee: *Pulbrook* v. *Richmond Mining Co.* (1878) 9 Ch. D. 610. It was there said that a man holds in his own right if he is registered without any qualification. This decision has been questioned, however, in the English Court of Appeal: *Bainbridge* v. *Smith* (1889) 41 Ch. D. 470. See also *Cooper* v. *Griffin* (1892) 1 Q. B. 740, and *Howard* v. *Sadler* (1893) 1 Q. B. 1. In order to hold shares in his own right the director must so hold that the company can safely deal with him as owner in respect of the shares: Buckley, L. J., in *Sutton* v. *English & Colonial* (1902) 2 Ch. 502, at p. 505. Accordingly, in that case it was held that where a trustee in bankruptcy notified the company that he claimed certain shares, the company could not have safely dealt with the shareholders in disregard of the claims of the trustee, and that, therefore, the shareholder had become disqualified from being elected a director.

Holding shares as liquidator of another company is not holding in the director's own right: *Boschoek* v. *Fuke* (1906) 1 Ch. 148. Nor is holding shares as collateral security sufficient: *Macdonald* v. *Drake* (1906) 16 Man. L. R. 220.

Absolutely.

The wording of section 75 differs from the terms of the articles under which the above English cases were decided by the addition of the word "absolutely," and there appears to be little doubt that in the case of companies subject to the Act a director must be the beneficial owner of his qualifying shares: *Ritchie* v. *Vermillion* (1902) 4 O. L. R. 588, per Maclennan, J.A., at p. 597. In *Lucas* v. *North Vancouver* (1913) 12 D. L. R. 802, 18 B. C. R. 239, Macdonald, C.J.A., and Galliher, J. A., held that under the Railway Act, R. S. C. 1906, c. 37, s. 112, which states that "no person shall be a director unless he is a shareholder owning twenty shares of stock, etc.," holding shares as trustee without any beneficial interest in them was not enough. The

remaining judge, Irving, J.A., while dissenting as to the effect of the words of the section of the Railway Act, at p. 805, stated that under the Dominion Companies Act a director can not qualify on shares held in trust. Sect. 75.

It is not necessary for the qualification of a director that he should have been actually registered as a shareholder; if his subscription for the requisite number of shares has been accepted that is enough: *Alley* v. *Trenholme* (1893) Que. 3 S. C. 163.

See *Morden* v. *Heckels* (1908) 17 Man. L. R. 557. Not in arrear in respect of calls.

The restrictions in subsection (2) would not seem to be applicable to the prospectus of an intended company.

Payment in cash of qualification shares is not required: *Paul* v. *Kobold* (1905) 2 W. L. R. 90, per Harvey, J., citing *St. Stephen Branch Ry. Co.* v. *Black* (1870-1) 13 N. B. R. 139; and even if it were required a by-law providing that the acts of unqualified directors should be valid would cure the irregularity, *ibid.* Mode of payment.

Where the statute or articles of association merely state that the director's qualification is the holding of a certain number of shares he may qualify although he holds them jointly with another person: *In re Glory Paper Mills Co., Dunster's Case* (1894) 3 Ch. 473. Shares held jointly.

The eligibility of directors should not be enquired into a collateral way: *Modstock Co.* v. *Harris* (1884-1907) 40 N. S. R. 336; *Austin* v. *Gemmell* (1885-6) 10 O. R. 696. Eligibility, how enquired into.

A single shareholder has a right of action for a declaration that directors are disqualified: *Theatre Amusement Co.* v. *Stone* (1914) 50 S. C. R. 32.

A director may be estopped from denying the qualification of another: *Kiely* v. *Smyth*, 27 Gr. 222.

A qualified director may bring an action in his own name against the other directors for an injunction to restrain them from wrongfully excluding him: *Pulbrook* v. *Richmond* (1878) 9 Ch. D. 610.

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It has been held that a company registered under the Companies Act, 1862 (Imperial) may have a limited company as a director: *Re Buluwayo Market Co.* (1907) 2 Ch. 458. It is at least doubtful whether this would be permissible under the Act, which appears to contemplate individuals only as directors; cf. s. 79.

Ceasing to hold qualification and loss of office.

The Act contains no provision that on loss of share qualification the office of a director is vacated such as is found in the Ontario Act, R. S. O. 1914, c. 178, s. 87. The common form of by-law relating to the vacation of office by directors in certain events provides that a director shall *ipso facto* vacate his office on ceasing to hold his share qualification. In the absence of such a by-law a director would not *ipso facto* cease to hold office: *Pulbrook* v. *Richmond* (1878) 9 Ch. D. 610.

Disqualification of directors.

The usual form of by-law provides that the office of a director shall *ipso facto* be vacated:—

(a) If he accepts or holds any other office under the company except that of managing-director, or

(b) If he becomes bankrupt, or suspends payment, or compounds with his creditors, or

(c) If he is found lunatic or becomes of unsound mind, or

(d) If he ceases to hold the required amount of shares to qualify him for office, or

(e) If he absents himself from the meetings of the directors during a period of three calendar months without special leave of absence from the directors, or

(f) If he is concerned or interested in or participates in the profits of any contract with or work done for the company; but no director shall vacate his office by reason of his being a member or shareholder of any company, which has entered into contracts with or done any work for the company, or which is concerned in or participates in the profits of any contract with the company. Nevertheless he shall not vote in respect of any contract in which he is so interested, or

(g) If by notice in writing to the company he resigns his office.

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Holds any other office.

Prima facie a director who accepts any other office in the company vacates his directorship: *Milward* v. *Thatcher* (1787) 2 T.R. 81; *Iron Ships, &c., Co.* v. *Blunt* (1868) L. R. 3 C. P. 484. The appointment is good but the director loses his office: *Eales* v. *Cumberland* (1861) 6 H. & N. 481. A trustee of a covering trust deed nominated and paid by the company is within the prohibition: *Astley* v. *Tivoli* (1899) 1 Ch. 151. And where a director is appointed managing director at a remuneration he will not only automatically vacate his office but will also be disentitled to recover his salary from the company if the necessary procedure for validating his remuneration has not been followed: *Claudet* v. *Golden Giant Mines* (1909-10) 15 B. C. R. 13.

Becomes bankrupt.

Where a director becomes financially insolvent and writes to creditors asking them to accept a composition, and holds out as an inducement to each to do so that other creditors are willing to accept the proposition, he is insolvent within the meaning of the above by-law. See also *London & Counties, &c., Co.* v. *Brighton* (1915) 84 L. J. K. B. 991; 2 K. B. 493.

Ceases to hold qualification.

Vide supra.

Absents himself from meetings

Voluntary and deliberate absence only is covered by the provision which does not apply to absence due to illness: *Mack's Claim* (1900) W. N. 114. Time does not begin to run until he has failed to attend a meeting at which he ought to have been present: *In re London & Northern Bank, McConnell's Claim* (1901) 1 Ch. 728.

Making unauthorized profits.

Directors who are members of a partnership firm which supplies goods to the company at a profit thereby become disqualified. Where such contracts were in violation of the provisions of the Alberta Companies Ordinance art. 57, Table "A," it was held that they could not be ratified by a majority of the shareholders however great: *Theatre Amusement Co.* v. *Stone* (1915) 50 S. C. R. 32; a unanimous vote of the shareholders alone would suffice, per Anglin, J., at p. 37.

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A man who is a shareholder in another company which contracts with the company is "interested in the contract": *Todd* v. *Robinson* (1884) 14 Q. B. D. 739; *Dimes* v. *Grand Junction Canal Co.* (1852) 3 H. L. C. 794; *Whitely* v. *Barley* (1888) 21 Q. B. D. 154.

Where a director becomes disqualified by some act such as being secretly interested in a contract, the board have no power to condone it, but it has been held that the disqualification continues only so long as the contract continues, and the director's subsequent re-election may be valid: *Bodega Co.* (1904) 1 Ch. 276.

Resignation.

A valid resignation cannot be withdrawn: *Regina* v. *Mayor of Wigan* (1885) 14 Q. B. D. 908. If it is desired to suspend the operation of the resignation until acceptance by the board the words "and such resignation is accepted" should be added to paragraph (g) above: *Glossop* v. *Glossop* (1907), 2 Ch. 370.

Number of directors.
Head office.
Sanction of shareholders.
Deposit of by-law.

76. The company may, by by-law, increase or decrease to not less than three the number of its directors, or may change the company's chief place of business in Canada: Provided that no by-law for either of the said purposes shall be valid or acted upon unless it is approved by a vote of at least two-thirds in value of the stock represented by the shareholders present at a special general meeting duly called for considering the by-law; nor until a copy of such by-law, certified under the seal of the company, has been deposited in the Department of the Secretary of State of Canada and published in the *Canada Gazette.*" (1918, 8-9 Geo. V., c. 13, s. 3).

Chief place of business.

See the note to s. 30.

Changing number of directors.

Section 72 fixing the minimum number of the board does not affect the right of the company to pass by-laws to increase the number of directors: *Sovereen* v. *Whiteside* (1906) 12 O. L. R. 638, 640.

Requisites.

The following formalities are required by the section:—

1. The change must be made by by-law.

A resolution is insufficient: *Johnston* v. *Wade* (1909) 17 O. L. R. 372, per MacMahon, J., at pp. 375-6, and see *Sherker* v. *Rudner* (1911) 39 Que. S. C. 44, 47. For the distinction between a resolution and a by-law

see *Manes Tailoring Co. & Willson* (1907) 14 O. L. R. 89. Sect. 76.

2. The by-law must be approved by at least two-thirds in value of the stock represented at a special general meeting of the shareholders duly called for considering the by-law.

"Two-thirds in value" is to be computed on the face value of the number of shares held and not upon the amount paid up: *Purdom* v. *Ontario Loan & Debenture Co.* (1893) 22 O. R. 597.

The meeting must be "special," *i.e.*, notice of the special business to be transacted must be given to the shareholders. Thus it is not a compliance with the section for the by-law to be passed at a general annual meeting without special notice: *Sherker* v. *Rudner* (1911) 39 Que. S. C. 44; *Christopher* v. *Noxon* (1884) 4 O. R. 672. The meeting must be duly called. As to the requirements in this regard see the notes to s. 88.

See also *Manes Tailoring Co.* v. *Willson* (1907) 14 O. L. R. 89, 96, and *Clary* v. *Golden Rose* (1912-13) 4 O. W. N. 1491.

Quære, if all the shareholders unanimously consent to the change, notwithstanding the non-compliance with the above requirements, whether this requirement may be dispensed with.

In *Sherker* v. *Rudner* (1911) 39 Que. S. C. 44, it was said no acquiescence could cure non-compliance with the section, and see *Re Carpenter, Ltd., Hamilton's Case* (1916) 35 O. L. R. 626.

3. A copy of the by-law, certified under the seal of the company, must be deposited with the Department and published in the *Canada Gazette*.

The section does not specifically state that such publication should take place after confirmation of the by-law, but it is suggested that this is advisable.

Until the requirements of the section are complied with the by-law is ineffective, and an election of an increased board under such a by-law is void and confers no right on those elected to hold office: *Sherker* v. *Rudner* (1911) 39 S. C. 44, and in the last mentioned Effect of non-compliance.

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case it was held that an action lay in the nature of *quo warranto* proceedings under art. 987 *et seq.* C. P. (Que.) to oust the director so irregularly elected, and that a shareholder present at the meeting and not objecting could bring an action. A resolution to forfeit shares for non-payment of calls, passed by an illegal board, is invalid, and the forfeiture will be restrained: *Christopher* v. *Noxon* (1884) 4 O. R. 672. The company was held in the same case to be properly made a party to the action. See also *Manes Tailoring Co.* v. *Willson* (1907) 14 O. L. R. 89.

Election of directors.

77. Directors of the company shall be elected by the shareholders, in general meeting of the company assembled at some place within Canada, at such times, in such manner and for such term, not exceeding two years, as the letters patent, or in default thereof, as the by-laws of the company prescribe. 2 E. VII., c. 15, s. 65.

The above section requires that the board of directors be elected by the shareholders. It is only in the case of vacancies occurring during the term of office of an elected board that the remaining directors under s. 78 (c) of the Act have the power to appoint directors to complete the board.

In view of the above requirement, it is doubtful whether it would be legal for a company incorporated under the Act to bind itself by agreement, or to pass a by-law, that one or more directors should be appointed by a named individual or by some outside body. In any event it is doubtful whether the contract by a company to elect as directors nominees of an outside body will be specifically enforced: *Plantations Trust, Ltd.* v. *Bila Rubber Lands, Ltd.* (1916) 114 L. T. 676; see also as to agreement that a shareholder shall have the right of appointing or nominating a director of the company: *British Murac Syndicate* v. *Alperton* (1915) 2 Ch. 186.

The election must take place at a general meeting of the shareholders at some place within Canada, and the term of their office is limited to two years. Unless the letters patent or the by-laws prescribe that the

term of office shall exceed one year the election of directors shall take place yearly, s. 78 (a). It should be noted, however, that under s. 74 it is provided that retiring directors shall continue in office until their successors are elected. Accordingly, retiring directors would remain in office notwithstanding that their term of office had expired and that the shareholders had failed to elect a new board. Sect. 77.

Quære, whether directors can be validly elected at a meeting of shareholders held outside Canada. Possibly this may be done if all the shareholders attend or are represented at the meeting and no objection is taken. See *Re Lands and Homes of Canada, Robertson's Case* (1919) 44 D. L. R. 325, 327.

Unless the by-laws provide that no shareholder shall be entitled to be present at a meeting or to be reckoned in a quorum whilst any call is due by him to the company, possibly shareholders not entitled to vote may be entitled to form a quorum. In *Doig* v. *Mathews* (1915) 25 D. L. R. 732, an interim injunction was refused where an election of directors was attacked on the ground that there was an insufficient quorum under the articles without counting shareholders present who were disqualified from voting, owing to their being in arrears in respect of calls. It is, accordingly, advisable for the by-laws to make special provision covering this point.

78. In the absence of other provisions in that behalf, in the letters patent or by-laws of the company,— If no other provision.

(*a*) the election of directors shall take place yearly, and all the directors then in office shall retire, but, if otherwise qualified, they shall be eligible for re-election; Yearly election.

(*b*) every election of directors shall be by ballot; By ballot.

(*c*) any vacancy occurring in the board of directors may be filled, for the remainder of the term, by the directors from among the qualified shareholders of the company; Vacancies filled by directors.

(*d*) the directors shall, from time to time, elect from among themselves a president and, if they see fit, a vice-president of the company; and may also appoint all other officers thereof. 2 E. VII., c. 15, s. 66. Officers appointed by directors.

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The above provisions may be modified by the letters patent or by-laws of the company, subject, of course, to the restrictions imposed by the Act.

(a) Yearly election.

It should be noted that it is provided by s. 74 that retiring directors continue in office until their successors are elected.

An election of directors before the term of office of their predecessors has expired is apparently a nullity, and mandamus will lie to compel the company to proceed to another election on the day fixed by the charter: *The Queen* v. *The Bank of Upper Canada* (1849) 5 U. C. R. 338. In that case Robinson, C.J., seemed to be of the opinion that *quo warranto* would be a proper proceeding where the object was not to call in question by what right an officer of a corporation pretends to hold office, but whether the corporation itself has not, as a body, acted in disregard of the provisions of its charter.

If the by-laws provide that the directors shall hold office for one year and until their successors are appointed, the shareholders cannot themselves pass another by-law providing that the appointment is terminable by resolution. They must wait until the next annual meeting and put in a new set of directors who will pass a new by-law: *Stevenson* v. *Vokes* (1896) 27 O. R. 691.

Quære, whether shareholders cannot at any time call a special meeting by requisition under s. 87 of the Act and put in a new board.

Where the letters patent authorize shareholders to depose directors, the notice of the meeting called for this purpose must clearly disclose what is intended to be done and not be so framed as to lead shareholders to believe that it is only intended to fill vacancies: *Milot* v. *Perrault,* C. R. (1886) 12 Que. L. R. 193.

(b) By ballot.

Although the Act requires directors to be elected by ballot, an election by unanimous vote without ballot

will be valid if no more than the necessary number of directors are nominated: *Morden* v. *Heckels* (1908) 17 Man. L. R. 557, and where the number of qualified shareholders is the same as that of the board, no formal election is necessary: *Kiely* v. *Kiely* (1878-9) 3 A. R. 438. Sect. 78.

(c) Vacancies filled by directors.

The power given to the directors by this sub-section to fill vacancies is only exercisable in the interval between the vacancy arising and the next annual meeting. If the vacancy were not filled during that time, nor any directors elected at the annual meeting, the board would apparently not have power to elect a director after the date of the annual meeting: *Kiely* v. *Kiely* (1878) 3 A. R. 438, at p. 443. Power when exercisable.

In *Sovereen* v. *Whiteside* (1906) 12 O. L. R. 638, 640, it was held that if less than the quorum under the by-laws is in office the remaining directors cannot fill vacancies under this section; see also *Newhaven Local Board* v. *Newhaven School Board* (1885) 30 Ch. D. 350. No quorum.

It is difficult to reconcile all the cases dealing with the powers of continuing directors after the board has become incomplete by resignations or vacancies arising from disqualification.

In *Toronto Brewing and Malting Co.* v. *Blake* (1882) 2 O. R. 175, Proudfoot, J., held that on the board becoming incomplete owing to the disqualification of one of three directors, the directorate became incompetent to manage the affairs of the company. *Semble*, also, even assuming that a quorum of two of the directors could manage the business, yet where neither the statute nor by-laws gave the president a casting vote, resolutions passed by such a vote at a meeting attended only by the president and one other director were invalid.

On the other hand, in *Channel Collieries Trust* v. *Dover, &c., Railway* (1915) 84 L. J. Ch. 28, it was held that where two of the board of three ceased to be directors, the sole remaining director could by appointment complete the board. This was a case under the Com-

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panies Clauses Consolidation Act, 1845, s. 89 of which provided that the remaining directors, if they thought proper to do so, might elect some other shareholder in the place of the directors. Lord Cozens Hardy, M.R., pointed out that it is common for a company to have a board of directors which is merely the quorum and therefore, unless the continuing directors can fill up the vacancy the company would be at a dead-lock and nothing could be done except by the intervention of the Court in the manner suggested by Mellish, L.J., in *Macdougall* v. *Gardiner* (1875) L. R. 10 Ch. 606. It should be noted, however, that the Companies Clauses Consolidation Act contains no provision corresponding to s. 74 of the Dominion Act.

Presence of disqualified directors.

It was also held in *Morden* v. *Heckels* (1908) 17 Man. L. R. 557, that the presence, on the board of directors, of three who were not qualified by reason of being in arrears in respect of unpaid calls at the time of their election, is not sufficient to invalidate the acts of the board done by a legal quorum of properly elected directors.

Power of shareholders to elect.

Apparently the power given to directors by s. 78 (c) to complete the board, would not deprive a general meeting of the company of the power to elect directors where there are no directors, or where the directors do not think fit to exercise their power: *Isle of Wight Railway* v. *Tahourdin* (1883-4) 25 Ch. D. 332.

(d) Officers appointed by the directors.

As to the effect of the words "from time to time" see *Steindler* v. *Maclaren* (1909) 14 O. W. R. 647.

See the note to s. 32 dealing with the appointment of officers.

The directors are also authorized by s. 80 (d) to pass by-laws as to the appointment of officers of the company; such by-laws do not require confirmation by the shareholders, s. 81.

Regularity of elections.

A director or officer whose election is obtained by trick or artifice, cannot be considered a *bona fide* direc-

tor, but where shares have been actually purchased and paid for the fact of their being purchased with a view to influencing the election is not material: *Toronto Brewing and Malting Co.* v. *Blake* (1882) 2 O. R. 175. Sect. 78.

Failure to notify all the shareholders will nullify the election unless all the shareholders attend in person or by proxy, even though an absolute majority of the shareholders vote for the directors elected: *Milot* v. *Perrault* (1886) 12 Que. L. R. 193. Improper rejection of proxies is ground for setting aside an election of directors: *Kelly* v. *Electrical* (1908) 16 O. L. R. 232, 240; so also the fact that shareholders not entitled to vote because in arrear in respect of calls have been permitted to vote: *Armstrong* v. *McGibbon* (1906) Q. R. 15 K. B. 345.

Persons whose names appear without qualification on the register as shareholders are entitled to vote, and it is not necessary that they should be beneficial owners of the shares, and the presiding officer may not adjudicate on the right to vote as between persons so registered and other persons claiming the shares: *Tough Oakes* v. *Foster* (1917) 39 O. L. R. 144.

Where candidates for the board of directors acted as scrutineers and exercised their discretion as to the right of certain voters to vote, it was held that the duty of the scrutineers was so plainly in conflict with their interest as candidates that they were disqualified from acting, and the election was set aside: *Dickson* v *Murray* (1881) 28 Gr. 533.

A meeting of shareholders called for twelve o'clock, opened by the shareholders present at one minute after twelve, which immediately elects a board of directors and adjourns at ten minutes after twelve, is a fraud on absent shareholders: *Armstrong* v. *McGibbon* (1906) Q. R. 15 K. B. 345.

In Ontario it has been held that *quo warranto* will not lie in the case of an ordinary trading corporation: *The Queen* v. *Hespeler* (1854) 11 U. C. R. 22; see also *In re Albert Mining Co.* (1873-5) 15 N. B. R. 29. It might seem, however, that if the company were exer- *Quo warranto.*

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cising functions of a semi-public nature, and had objects of public concern *quo warranto* proceedings could be taken: *Re Moore and the Port Bruce Harbour Co.* (1857) 14 U. C. R. 365. This procedure is permissible in Quebec: *Sherker* v. *Rudner* (1911) 39 Que. S. C. 44; *Gilbert* v. *Hall* (1886) M. L. R. 2 Q. B. 374; *Armstrong* v. *McGibbon* (1906) Q. R. 15 K. B. 345.

Mandamus.

In *Re Moore and the Port Bruce Harbour Co.*(1857) 14 U. C. R. 365, 367, the right to proceed by way of mandamus was also discussed, and it was considered that it should be confined to cases in which the election had been merely colorable and altogether void and not to cases where votes had been improperly received or rejected, or where the candidate's qualification had been taken exception to; and the fact that an election was not attacked for eight months was considered as a ground for refusing relief, *ibid.*

Mandatory injunction.

As to the right to proceed by mandatory injunction see *Toronto Brewing Co.* v. *Blake* (1882) 2 O. R. 175 and *Gilman* v. *Robertson* (1884) 7 Legal News 60 S. C.

Equitable jurisdiction.

As to the jurisdiction in equity to set aside an election it was said in a case in the Ontario Court of Chancery that, if a person subscribed for a large amount of stock for the purpose of voting for certain directors and with the assurance that when elected the directors would cancel his subscription, the Court of Chancery would have justification to set aside the election: *Davidson* v. *Grange* (1854) 4 Gr. 377. The observation, however, was *obiter* in that case.

Procedure.

In Ontario an action is usually brought to set aside the election, and this must *prima facie* be brought in the name of the company: *Kelly* v. *Electrical* (1908) 16 O. L. R. 232; and one shareholder can not sue even though he brings the action on behalf of himself and all other shareholders: *Fraser River Mining Co.* v. *Gallagher* (1896-7) 5 B. C. R. 82. But where the company was a party defendant and all necessary parties were before the court, Mulock, C. J., held that it was proper to dispose of the case on its merits and set aside an irregular election of directors conditionally

on the plaintiffs' obtaining authority to use the name of the company as plaintiff and amending their statement of claim, the existing directors to continue in office until the election of their successors: *Kelly* v. *Electrical* (1908) 16 O. L. R. 232. Sect. 78.

If the directors are elected illegally and it is not merely an irregularity that is complained of, a shareholder not only need not make the company a party to the action but his right to bring it is not precluded by acquiescence in the election: *Sherker* v. *Rudner* (1911) 39 Que. S. C. 44. So also a minority can sue where it is charged that the directors who control a majority of the shares have brought about their election by fraudulent means: *Davidson* v. *Grange* (1854) 4 Gr. 377. Similarly where directors have become disqualified under the articles by contracting with the company at a profit any shareholder has a right of action for a declaration of such disqualification: *Theatre Amusement Co.* v. *Stone* (1915) 50 S. C. R. 32.

The general opinion seems to be that slight irregularities in matters of form will not render an election void which has otherwise been fairly held. Where all subscribers to a memorandum of association concurred in the appointment of the first directors, the fact that they did not meet together for the purpose of coming to their determination did not invalidate their act; and also a resolution, passed at a general meeting, at which an election to fill vacancies might have been held, authorizing the existing directors to continue in their offices, was held tantamount to a re-election of them: *Great Northern Salt & Chemical Works* (1890) 44 Ch. D. 472; and see remarks of Lindley, L. J., in *Re George Newman & Co.* (1895) 1 Ch. 674. Slight irregularities in elections.

In the United States corporate elections will be scrutinized by the Courts, and will be set aside where the successful party has succeeded by means of fraud and trickery: *People* v. *Albany Ry Co.*, 55 Bank (N.Y.) 344. But mere irregularities in matters of form will not avoid a corporate election otherwise fairly held, American rule.

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as an adjournment which takes place during the process of ballot: *Penobscott, etc. R. Co.* v. *Dunn* (1885) 39 Me. 587.

And equity has no jurisdiction to turn out a usurping board of directors and instal the rightful incumbents: *Owen* v. *Whittaker,* 20 N. J. Eq. 122.

Directors *de facto.*

When an election is defective or irregular a director may still, if he acts in that capacity, bind the company. In such a case he is said to be a director "*de facto.*"

The eligibility of *de facto* directors to hold office can not be enquired into in a collateral way, *e.g.,* by a secretary of the company refusing to give up the company's books and setting up that the directors who displaced him were ineligible or not properly elected: *Modstock Mining Co.* v. *Harris* (1884-1907) 40 N. S. R. 336.

Persons publicly exercising the functions of private corporations have been held to be directors to this extent that their acts are deemed valid in respect of third persons, or are binding on the corporation so far as the rights of third parties are concerned: *R.* v. *Bedford Level* (1805) 6 East 368; *Re County Life Assce. Co.,* L. R. 5 Ch. 288; *Mahony* v. *East Holyford* (1875) L. R. 7 H. L. 869; *County of Gloucester Bank* v. *Rudry* (1895) 1 Ch. 629; *Macdonald* v. *Drake* (1906) 16 Man. 220, 226.

The mere fact that a number of men claim to be directors of a company for the purpose of a single transaction does not bring them within this rule, but otherwise where directors held over after the expiry of their tenure of office, or if acting though disqualified for the office, see note in 19 Am. & Eng. Corp. Cas. 160; *Thames Haven Dock, etc. Co.* v. *Hall,* 3 Eng. Ry. Cases 441. The true principle would seem to be that of estoppel as between the company and innocent third parties.

A director *de facto* is, like an executor *de son tort,* subject to the burdens of the office, but not entitled to any of its benefits: *Pearson* v. *Wheeler*

(1874) 55 N. H. 41; *Macdonald* v. *Drake* (1906) 16 Man. L. R. 220. When directors assume their fiduciary office they become liable in all respects as though rightly appointed and they cannot be heard to criticize the regularity of their appointment: *Re Owen Sound Lumber Company* (1915) 34 O. L. R. 528; (1916-17) 38 O. L. R. 414. Sect. 78.

The principle has also been applied to other agents of a company, and in any case where a person holds himself out as an agent or official of a corporation and the circumstances are such that in law the corporation could repudiate such person, or take proceedings to restrain him but has not done so, then his acts within his apparent authority will bind the corporation as regards persons ignorant of his true position, even though his assumption of authority is entirely unwarranted: *Mahoney* v. *East Holyford Mining Co.* (1875) L. R. 7 H. L. 869; and see *Allen* v. *Ont. & Rainy River R. Co.* (1898) 29 O. R. 510. Holding out.

The company alone may bring an action to restrain a *de facto* director irregularly elected from acting as director or representing himself as such. An individual shareholder has no such right: *Foss* v. *Harbottle* (1843) 2 Ha. 461; *Kelly* v. *Electrical* (1908) 16 O. L. R. 232. Nor can the right of *de facto* directors to act as directors be questioned collaterally by a defendant in an action brought against him by the company.

Where a company brought action against its former secretary to compel delivery up of books belonging to the company to a new secretary appointed by it, defendant pleaded he was still secretary, as the directors who appointed the new secretary had not been duly elected. Held, that the defence set up was not a proper way of testing the election of directors which should have been done by a motion to stay or set aside the proceedings: *Austin Mining Co.* v. *Gemmell* (1885-6) 10 O. R. 696.

In an action for an accounting brought by a company against its president the onus of proof is on the defendant who alleges that the company's board

Sect. 78. of directors is incomplete: *Temiscouta* v. *Macdonald* (1900-01) 3 Que. P. R. 462.

Director indemnified in suits respecting execution of his office.

79. Every director of the company, and his heirs, executors and administrators, and estate and effects, respectively, may, with the consent of the company given at any general meeting thereof, from time to time, and at all times, be indemnified and saved harmless out of the funds of the company, from and against all costs, charges and expenses whatsoever which such director sustains or incurs in or about any action, suit or proceeding which is brought, commenced or prosecuted against him, for or in respect of any act, deed, matter or thing whatsoever, made, done or permitted by him, in or about the execution of the duties of his office; and also from and against all other costs, charges and expenses which he sustains or incurs, in or about or in relation to the affairs thereof, except such costs, charges or expenses as are occasioned by his own wilful neglect or default. 2 E. VII., c. 15, s. 67.

And generally.

Exception.

s. 79. Right to indemnity, reimbursement for expenses.

The consent of the company, given at a general meeting, is requisite before indemnity can be obtained under the above section.

The by-laws usually provide that the directors shall be paid out of pocket disbursements, including travelling expenses, actually and properly incurred by them in connection with the affairs of the company, and such a by-law ratified by the shareholders will entitle a director to recover travelling expenses. But if payment of travelling expenses is not authorized by the by-laws, a director is not entitled to be reimbursed therefor, as he is impliedly bound to pay his travelling expenses out of his remuneration: *Young* v. *Naval, etc. Society* (1905) 1 K. B. 687.

The by-law should be comprehensive in its terms, as otherwise it may be found that certain disbursements are not covered, *e.g.*, in *Marmor Ltd.* v. *Alexander* (1908) S. C. 78, it was held that expenses of a director in travelling to attend meetings were not covered by an article providing for indemnification of directors for expenses incurred "in the execution of their respective offices." A director is, of course, entitled to be reimbursed for money properly spent on the company's behalf; see *Benor* v. *Canadian Mail* (1907) 10 O. W. R. 899.

Powers of Directors. **Sect. 80.**

Powers and duties of directors.

80. The directors of the company may administer the affairs of the company in all things, and make or cause to be made for the company, any description of contract which the company may, by law, enter into; and may, from time to time, make by-laws not contrary to law, or to the letters patent of the company, or to this Part, as to the following matters:—

By-laws.

As to stock.

(*a*) The regulating of the allotment of stock, the making of calls thereon; the payment thereof, the issue and registration of certificates of stock, the forfeiture of stock for non-payment, the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock;

Dividends.

(*b*) The declaration and payment of dividends;

Directors.

(*c*) The amount of the stock qualifications of the directors, and their remuneration, if any;

Agents and officers.

(*d*) The appointment, functions, duties and removal of all agents, officers and servants of the company, the security to be given by them to the company and their remuneration;

Meetings.

(*e*) The time and place for the holding of the annual meetings of the company, the calling of meetings, regular and special, of the board of directors and of the company, the quorum, the requirements as to proxies, and the procedure in all things at such meetings;

Penalties.

(*f*) The imposition and recovery of all penalties and forfeitures not otherwise provided for in this Part;

Generally.

(*g*) The conduct, in all other particulars, of the affairs of the company not otherwise provided for in this Part. 2 E. VII., c. 15, s. 68.

Confirmation of by-laws.

81. The directors may, from time to time, repeal, amend or re-enact such by-laws, but every such by-law, excepting by-laws made respecting agents, officers and servants of the company, and every repeal, amendment or re-enactment thereof, unless in the meantime confirmed at a general meeting of the company, duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereat, shall, at and from that time, cease to have force. 2 E. VII., c. 15, s. 68.

Position and powers of directors.

1. **Position of directors.**
   Directors' agents—and trustees for company.
   When trustees for shareholders.
   Liability to future shareholders.
   Fiduciary position.

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Fiduciary donees of powers.
Purchase of company's property.
Transfer of directors' shares.
Secret profits and commissions.
Termination of fiduciary relationship.

2. Contracts of directors with the company.
Where there is no by-law.
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4. Delegation.

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6. Personal liability of directors.
Negligence.
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Wages.
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7. Remuneration.
Right to remuneration.
Unjustifiable payments.
Gratuities—Past services.
Remuneration out of capital.
By issuing paid-up shares.
Waiver and forfeiture of right to remuneration.
Necessity for by-law.

Section 80, as well as defining the general powers of directors, authorizes the directors to pass by-laws with respect to specific subject matters. A number of these are dealt with elsewhere in the notes to other sections of the act relating thereto, as follows:—

Allotment of stock, s. 46.
Calls, ss. 58ff.
Issue of stock certificates, ss. 45 and 46;
Forfeiture of stock, s. 62.
Transfer of stock, ss. 64ff.
Declaration and payment of dividends, s. 70.
Stock qualification of directors, s. 75.
The appointment and functions, etc. of agents, officers and servants, s. 32;
Meetings of the company, ss. 87 and 88.

The powers of directors with regard to their remuneration are dealt with below.

In the present note the subject of directors is considered under the following heads:—

1. Position of directors.
2. Contracts of directors with the company.
3. Powers of directors.
4. Delegation.
5. Exercise of powers—Meetings.
6. Liability of directors.
7. Remuneration.

1. Position of directors.

A company must of necessity act by agents, and usually the persons by whom it acts are termed directors. The act does not define the exact position of

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directors. Directors have been described as mere trustees or agents of the company—trustees of the company's money and property; agents in the transactions which they enter into on behalf of the company: *G. E. Ry.* v. *Turner* (1872) 8 Ch. 149, p. 152. However, it is immaterial what term is used, so long as their true position is understood, "which is that they are really commercial men managing a trading company for the benefit of themselves and of all the other shareholders in it," per Jessel, M.R., in *In re Forest of Dean, etc. Company* (1878) 10 Ch. D. 450 at p. 452.

Directors are agents.

The rule that directors are agents in the transactions which they enter into on behalf of the company is established by numerous decisions. The company itself cannot act in its own person for it has no person. It can only act through directors, and the case is, as regards those directors, merely the case of principal and agent, for where an agent is liable the directors would be liable; where the liability would attach to the principal the liability is the liability of the company: *Ferguson* v. *Wilson* (1866) L. R. 2 Ch. 77.

Where directors contract in their individual names without disclosing that they are in truth acting for the company they will be personally liable to the other party to the contract: *Litchfield* v. *Saskatchewan &c Co.* (1907-8) 7 W. L. R. 475. A mere description of the contracting individuals as the directors of the company named will not release them from personal liability; so it was held, where a contract in writing read that "We, the directors of the A. B. Company, Limited, hereby agree," etc., that the directors were liable inasmuch as the written contract did not *purport to bind* the company: *Aggs* v. *Nicholson* (1856) 1 H. & N. 165; *McCollin* v. *Gilpin* (1880) 5 Q. B. D. 390. It is probably a question of fact upon the construction of the agreement not on extrinsic evidence, whether the directors are bound personally or not.

But although the directors are named as the contracting parties, if they are described as contracting

" on behalf of the company " or " for the company," the company alone is bound in the absence of any stipulation that the directors as well as the company are becoming responsible: *Gadd* v. *Houghton* (1876) 1 Ex. D. 357. Such limitation may be either in the body of the contract or added by way of qualification to the signature. *Ibid.* Secs. 80-81.

And trustees for company.

Directors are trustees for the company of the company's property: *Re Sharpe* (1892) 1 Ch, 154; *Forest of Dean, etc. Company* (1878) 10 Ch. D. 450; They cannot use the company's property for their own benefit: *Pure Canadian Silver Black Fox Co.* v. *Morrison* (1915) 24 D. L. R. 915. They are not, however, trustees for shareholders individually: *Percival* v. *Wright* (1902) 2 Ch. 421; nor for the company's creditors, *Poole's, Jackson's, Whyte's Cases* (1878) 9 Ch. Div. 322; *Wilson* v. *Bury* (1885) 5 Q. B. D. 518; *Ferguson* v. *Wilson* (1866) 2 Ch. App. 77; *Bank of Toronto* v. *Cobourg etc. Railway Company* (1885-6) 10 O. R. 376; *A.-G.* v. *Standard Trust* (1911) A. C. 498. They are not bound to invest the company's funds in trustee securities, and may invest them in the name of a sole trustee: *Burland* v. *Earle* (1902) A. C. 83. As trustees the conduct of directors is to be considered with reference to the particular business they are appointed to manage, but it has been repeatedly held that directors who have misapplied funds were liable for "breach of trust," *Faure Electric Company* (1888) 40 Ch. D. 150; *Masonic & General Life, etc. Co.* v. *Sharpe* (1892) 1 Ch. 154. See *Smith* v. *Anderson* (1880) 15 Ch. D. 275; *Therien* v. *Brody* (1893) 4 Que. S. C. 23. Where a director has made himself liable for a breach of trust he is bound to reimburse the company: *Joint Stock Discount* v. *Brown* (1869) L. R. 8 Eq. 381. If the directors have abused their position so as to get an advantage at the expense of the company, it is for the corporation or its shareholders to complain, and not for an outsider; and debenture holders, who had obtained their debentures after certain directors of the company had caused deben-

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tures to be issued to themselves at a discount of twenty-five per cent. in satisfaction of their claims against the company, were held to have no status to attack the issue made to the directors as being invalid because of the discount: *Bank of Toronto* v. *Cobourg Ry.* (1885) 10 O. R. 376. The transaction was not *ultra vires* nor was it void, and could only be complained of as unfair by the company or a corporator: *Ibid.;* and see *Greenstreet* v. *Paris* (1874) 21 Gr. 229.

When trustees for shareholders.

In ordinary cases no fiduciary relationship exists between the directors and the shareholders of the company as such: *Percival* v. *Wright* (1902) 2 Ch. 421; but under special circumstances the shareholders may be entitled to set up that a fiduciary relationship has been established and to treat the directors as trustees for them. So where directors of a company were approached with a view to effecting a merger to be carried out by a sale of the assets of the company of which they were directors, and the directors secured the consent of the majority of the shareholders and surreptitiously acquired shares of the new company for their own profit, it was held that the directors became the agents, in the transaction, of the shareholders, and that the latter were entitled to treat the directors as trustees for them of the profit made: *Allen* v. *Hyatt* (1914) 17 D. L. R. 7. See also *Gadsden* v. *Bennetto* (1913) 3 D. L. R. 719, where directors, having conspired to dispose of the company's property and make a secret profit, acquired shares at an undervalue from the shareholders by suppressing the terms of the offer received for the company's property, and were held to be trustees for the shareholders of the profits made. It was also held in the same case that where a committee of the directors is appointed for the purpose of disposing, not only of the property of the company, but also of the shares belonging to individual shareholders, the responsibility of the members of the committee is different from that of ordinary directors, they being confidential agents of the shareholders as well as of the company.

Directors may also stand in a fiduciary relationship as regards future subscribers of shares where new shareholders are brought into the company: *In re Hess Mfg. Co., Edgar* v. *Sloan* (1894) 23 S. C. R. 644. In such cases where a director has committed a breach of the fiduciary relationship to future subscribers by failure to make proper disclosure in respect of a contract entered into with the company, the latter will not be bound: *Denman* v. *Clover Bar* (1913) 48 S. C. R. 318. See also *Crawford* v. *Bathurst Land &c. Co.*, (1916) 37 O. L. R. 611; (1918) 42 O. L. R. 256; (1920) 50 D. L. R. 457.

Liability to future shareholders.

It is a director's duty to give his whole ability, business knowledge, exertion and attention to the best interests of the shareholders who have placed him in that position: *Re Iron Clay Brick Mfg. Co.* (1889) 19 O. R. 113, 123. *Prima facie*, however, a director may act as a director of a rival company: *London, &c., Co.* v. *New Mashonaland Co.* (1891) W. N. 165. It is incumbent upon a director to assume no part which would be inconsistent with a proper, free and independent discharge of his duties in that respect. No one occupying a fiduciary relationship can be permitted to do an act on his own personal behalf which might or could be construed to be inconsistent with the fiduciary character which he held at the time: *Re Iron Clay Brick Mfg. Co., supra.*

Fiduciary position.

So where a director was to be paid a commission of 12½ per cent. for selling the company's stock, but sold none, and made an arrangement with another person whereby the latter was to sell on a 5 per cent. commission, which was held to be a fair commission, the director was held liable to account to the company for the difference: *Stickney* v. *Buckel* (1905) 6 O. W. R. 751.

See also on the duties of directors: *Giguere* v. *Colas* (1915) 48 Que. S. C. 198.

Directors are fiduciary donees of their powers, *e.g.*, of making calls: *Alexander* v. *Automatic* (1899) 2 Ch. 302; of issuing and allotting shares: *Madden* v.

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Dimond (1904-7) 12 B. C. R. 80; *Martin* v. *Gibson* (1908) 5 O. L. R. 623; permitting transfers of unpaid shares: *Peterborough Cold Storage Co.* (1907) 14 O. L. R. 480; forfeiting shares: *Blisset* v. *Daniel* (1853) 10 Hare, 483; and their powers must be exercised *bona fide* for the company's benefit: *Madden* v. *Dimond, supra; Rudolph* v. *Macey* (1906) 3 W. L. R. 52. So also they must not sell the company's property at an undervaluation: *Daniel* v. *Goldhill* (1899) 6 B. C. R. 495; *Boyle* v. *Rothschild* (1907) 10 O. W. R. 696.

Purchase of company's property.

A director is not precluded from purchasing the company's property after the fiduciary relationship has come to an end: *Chatham National Bank* v. *McKeen* (1895) 24 S. C. R. 348. A director is in the same position as a trustee. If his position is fully disclosed and every precaution taken the transaction will be good.

Even where a director of a joint stock company who had a judgment against the company and on a sale of the company's property under a mortgage held by a third party, purchased the same for his own benefit, he was held to be a trustee thereof for the company and accountable for any profit received on a re-sale: *Re Iron Clay Brick Mfg. Co.* (1889) 19 O. R. 113. The very fact of the director's appearance at the sale, the public knowing that he was a director of the company whose lands were being sold, would have the effect of dampening the bidding, and the chances of a good, fair price being realized were greatly lessened thereby and the director was in that respect guilty of a breach of trust, *ibid.*

Directors are not at liberty to sacrifice the interests of the company and while ostensibly acting for the latter, divert in their own favor business which would properly belong to the company they represent. Thus, where directors, while still retaining their position as such, and still actually acting as managers of the company, negotiated for a contract on their own behalf in exactly the same manner as they had always acted for the company, and caused such contract to be made

and to be taken over by a new company formed by the directors, and thereafter used their voting power as shareholders to ratify and approve what was done and to release all claims against themselves as directors, it was held that the directors must be regarded as holding the benefit of such contract on behalf of the company, and that the transaction could not be regularized by resolutions of the company controlled by votes of the directors: *Cook* v. *Deeks* (1916) A. C. 554; 85 L. J. P. C. 161. Secs. 80-81.

On the other hand if directors *bona fide* and reasonably believe that they are acting in the company's interest they are not liable for breach of trust because in so acting they are also pursuing their own interest; *Hirsche* v. *Sims* (1894) A. C. 654 at p. 660; *Lagunas* v. *Lagunas Syndicate* (1899) 2 Ch. 392.

Transfer of directors' shares.

Transfer of directors' shares.

Ordinarily no trust rests upon the directors in favour of the other shareholders as to the transfer of the directors' shares; they have the power under ordinary circumstances to consent to a transfer of their own stock. A director is not a trustee for the general body of the shareholders so as to be unable to deal with his shares in a manner prejudicial to the interests of his *cestuis que trustent*, but is as free to deal with his stock, except perhaps his qualification shares, as any other person: *Re National Provincial Co., Gilbert's Case* (1870) L. R. 5 Ch. 559; *Thompson* v. *Canada, etc. Ins. Co.* (1885) 9 O. R. 284.

But if the directors are guilty of keeping the company in the dark as to the state of its affairs, until they, the directors, have transferred their shares for the purpose of getting rid of their own liability thereon, the Court will interfere to declare the transfer invalid: *Murray* v. *Bush* (1872) L. R. 6 H. L. 37.

It does not appear to have yet been definitely decided whether a director can, while holding that position, make a valid transfer of his qualification shares. Lord Romilly, M.R., in *Gilbert's Case*, *Re National Provin-*

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cial Co. (1870) L. R. 5 Ch. 559, thought he could not do so to avoid an impending call.

In Re South London Fish Market Co. (1888) 39 Ch. D. 324, 331, Mr. Justice Kay said: "Looking at the doctrine of this Court, that a voluntary transfer to escape liability in some cases, is a fraud, I cannot doubt that a director voluntarily transferring his qualification shares in order to escape liability, is *committing a fraud.* But it would seem that where the transfer is made without any design of escaping liability it will be effective to pass the shares to the transferee. The power to transfer his own shares is not given to him as director, but as one of the shareholders; and he should not be prevented from exercising that right to transfer, simply because he does it not for the benefit of the shareholders, but for his own personal benefit": *Re Cawley & Co.* (1889) 42. Ch. D. 209, 233. See also notes to s. 75, *supra.*

Secret profits, commissions, etc.

Directors are trustees in the strictest sense for the company, of secret profits, and will be bound to return them even though the company is no worse off as a result of such profits having been made: *Ruethel* v. *Thorpe* (1907) 9 O. W. R. 942; (1907) 10 O. W. R. 222.

In an action to make directors account for profits the company should be made a party to the proceedings: *Meyers* v. *Cain* (1905) 6 O. W. R. 834.

It is a breach of the fiduciary relationship for the directors to make a secret profit at the expense of the shareholders: *Gadsden* v. *Bennetto* (No. 2) (1913) 9 D. L. R. 719; *Crawford* v. *Bathurst Land &c. Co.* (1916) 37 O. L. R. 611 (1918) 42 D. L. R. 257; but see the same case in (1920) 50 D. L. R. 457, where the judgment below was reversed by a majority of the Supreme Court of Canada; and where a director has wrongfully diverted the company's funds to his own use, the company is entitled notwithstanding the consent of his co-directors, to claim the funds and interest thereon: *Rogers Hardware* v. *Rogers* (1913) 10 D. L. R. 541, but apparently not compound interest: *Saskat-*

chewan Land & Homestead Co. v. *Moore* (1915) 7 O. W. N. 684; (1915) 8 O. W. N. 525. Secs. 80-81.

Where a director is held liable to account, the company has the option of claiming the property itself, or its highest value whilst held by the director, and the latter is not released by proof that he paid for the property a sum which, at the time he bought it, was its then full market value: *Eden* v. *Ridsdales Co.* (1889) 23 Q. B. D. 368 (C.A.); *Re Iron Clay Mfg. Co.* (1889) 19 O. R. 113, 121.

Termination of fiduciary relationship.

Upon the appointment of a liquidator for a company which is being wound up under the Winding-up Act, R. S. C. 144, the fiduciary relation between the directors and the company is at an end unless their powers as directors have been continued as provided by s. 31 of that act: *Chatham National Bank* v. *McKeen* (1895) 24 S. C. R. 348.

See also *Holmested* v. *Annable* (1914) 18 D. L. R. 3; *Cook* v. *Deeks* (1916) 85 L. J. P. C. 161, at p. 163.

Thus where the company was in liquidation and had practically refused an extension of a lease the directors were held entitled to obtain an extension personally and for their own benefit: *Boston Shoe Co.* v. *Frank* (1914) Que. 48 S. C. 66.

The mere resignation of a director to take effect contemporaneously with the execution of a contract between the company and the directors, advantageous to the latter, will not assist the director as regards failure to comply with the fiduciary liability to make full disclosure to the company: *Denman* v. *Clover Bar Coal Co.* (1913) 48 S. C. R. 318; 15 D. L. R. 241.

Other cases.

In the absence of agreement there is no duty or obligation cast on the directors to pledge their own credit for the benefit of the company: *Christopher* v. *Noxon, Re Ingersoll Gas Co.* (1884) 4 O. R. 672, 682.

If there be fraud, or, if in the absence of proof of actual fraud, the facts make out a case of harsh treatment being practised by the majority of the directors against the minority, the court will interfere: *Waddell* v. *Ontario Canning Co.* (1889) 18 O. R. 41.

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So if it be shewn that the majority are banded together against the minority for the express purpose of taking advantage of their position, to obtain a personal benefit to themselves at the expense of those who are in the minority, the Court will interfere. *Ibid.*

Where a director of a company, who was also its president, was appointed by the board of directors to be the solicitor for the company, and acted as such, it was held in winding-up proceedings that he was in the position of a solicitor acting on behalf of himself and co-trustees, and was therefore not entitled to recover *profit* costs in respect of legal business done for the company, other than causes in Court: *Re Mimico Sewer Pipe Co.* (1895) 26 O. R. 289; *Cradock* v. *Piper* (1850) 1 Macn. & G. 664; *Re Corsellis* (1887) 34 Ch. D. 681; *Re Barber* (1886) 34 Ch. D. 77.

A by-law for increasing the capital stock of a joint-stock company prescribed the manner in which the new shares should be allotted, and provided that the allotment should be made, save as to twenty-one shares, by the shareholders. This by-law was sanctioned by the shareholders at a general meeting, and it was the basis of the new issue:—Held, that the directors had no power to pass a by-law directing its repeal, and providing for the allotment of the shares by themselves. A by-law was passed by the directors, and subsequently confirmed by the shareholders, providing that the directors should hold office for one year, and until their successors were appointed:—Held, that this by-law could only be repealed at the next annual general meeting of the company, and therefore a by-law passed, during the directors' year of office, by the shareholders at a special meeting of the company, providing that the appointment should be terminable by resolution, was invalid: *Stephenson* v. *Vokes* (1896) 27 O. R. 691.

A by-law or resolution of the directors will be invalid and *ultra vires* of the company if it operates unequally towards the interests of any class of the shareholders: *Northwest Electric Co.* v. *Walsh* (1898) 29 S. C. R. 33.

The mere fact that persons in a board of directors are interested in the affairs of another corporation, which is a controlling stockholder in the former, does not afford a ground of presumption against the legality and fairness of dealings and transactions between the two companies, although it may subject their conduct to rigid scrutiny by the Court: *Davis* v. *United States Electric Power Co.*, 77 Md. 35.

Where by the incorporating statute a one-fourth part in value of the shareholders of the company have a right to call a special meeting thereof for the transaction of the company's business, it is not open to the directors further to limit that right by by-law, and to require at least one-third of the shareholders: *Austin Mining Co.* v. *Gemmell* (1886) 10 O. R. 696, 705; *Re Cambrian Peat & Fuel Co* (1875) 34 W. R. 405.

2. Contracts of directors with the company.

The right of a director to contract with the company is of the narrowest description. He may subscribe for the company's shares and bonds in the usual way: *Campbell's Case* (1876) 4 Ch. D. 470, but otherwise, unless authorized by the by-laws or by resolution of the shareholders, a director is disqualified from entering into contracts with the company: *Albion* v. *Martin* (1875-6) 1 Ch. D. 580; *Roray* v. *Howe Sound*, (1915) 22 D. L. R. 855. No statutory prohibition is required to invalidate a contract made between a director and the company, for the director's disability from contracting with the company follows from his fiduciary position as trustee. In *North-West Transportation Co.* v. *Beatty* (1887) 12 App. Cas. 589, Sir Richard Baggallay said, "A director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director." See also *Benson* v. *Heathorn* (1842) 14 Y. & C. Ch. 326. It is immaterial

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whether the terms of the contract are the best that could be obtained: *Madden* v. *Dimond* (1905) 12 B. C. R. 80.

No man can be allowed to put himself in a position in which his interest and duty will conflict: *Parker* v. *McKenna* (1874) L. R. 10 Ch. 118. See also *Aberdeen Railway* v. *Blaikie* (1854) 1 Macq. H. L. 461.

A director will be held to be contracting with the company within the meaning of the above rule where the director is a shareholder in another company, whether beneficially or as a trustee, and without regard to the quantum of his holding: *Transvaal Lands Co.* v. *New Belgium &c. Co.* (1914) 2 Ch. 488; (1915) 84 L. J. Ch. 94.

Contracts between the directors and a company are however common. The company may, and frequently does, by its by-laws, authorize contracts with its directors, subject to specified conditions. Different results follow, depending on whether there is or is not such a by-law in existence.

No by-law.

Where there is no by-law authorizing the directors to enter into contracts with the company no question of the fairness or unfairness of the contract can arise, and unless the contract is sanctioned by the shareholders the profit arising therefrom can be recovered: *Imperial &c., Association* v. *Coleman* (1871) 6 Ch. 558 at p. 567; *Parker* v. *McKenna* (1874) 10 Ch. 118; *In re The Cardiff Preserved Coal Co.* (1862-3) 32 L. J. Ch. 154. A general meeting of the shareholders can, however, sanction a contract in which a director is interested, in which event the director will be protected: *Grant* v. *United Switchback Co.* (1884) 40 Ch. D. 135. See also *Morison* v. *Thompson* (1874) L. R. 9 Q. B. 480; *Dunne* v. *English* (1871) L. R. 18 Eq. 524; *Eden* v. *Risdales Co.* (1889) 23 Q. B. D. 368; *Van Hummell* v. *International &c. Co.* (1913) 10 D. L. R. 306; *N. W. Transportation Co.* v. *Beatty* (1887) 12 A. C. 589.

The notice of meeting should set out particulars of the director's interest: *Kaye* v. *Croydon* (1898) 1 Ch. 358; *Tessier* v. *Henderson* (1899) 1 Ch. 861; *Normandy* v. *Ind Coope & Co.* (1908) 1 Ch. 84.

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The director is not prevented from using his voting power as a shareholder for the purpose of procuring the ratification of a contract fair in its terms: *North-West Transportation Co.* v. *Beatty* (1887) 12 App. Cas. 589.

Where there is a by-law.

Modern by-laws either expressly authorize directors to enter into contracts with the company subject to their making full disclosure of their interest and refraining from voting; or confer an implied authorization by providing that such directors shall not vacate their office by reason of being interested in contracts with the company provided they make full disclosure and refrain from voting. See *Costa Rica Ry.* v. *Forwood* (1900) 1 Ch. 756; (1901) 1 Ch. 746. As to what constitutes compliance with the conditions of the by-law see *Imperial, &c., Co.* v. *Coleman* (1873) L. R. 6 H. L. 189.

Unless the by-law expressly states that the director is not disqualified from contracting with the company by reason of being a shareholder in another company the general rule applies: *Transvaal Lands, &c., Co.* v. *New Belgium, &c., Co.* (1914) 2 Ch. 488; (1915) 84 L. J. Ch. 94. If the provisions of the by-law authorizing the contract are not complied with, the contract is voidable as if no such by-law existed, *ibid.*

Where the articles of a company imposed the penalty of disqualification on directors contracting with the company at a profit, the consequences of an infraction of the article were held to be not only disqualification of the offending directors but the giving of a right of action to any shareholder for a declaration of such disqualification and an account of the moneys improperly received. Nor could such a contract be ratified by a majority of the shareholders as the matter was not merely one of internal management: *Theatre Amusement Co.* v. *Stone* (1915) 50 S. C. R. 32.

Director voting on contract.

It is not necessary in order to vitiate a contract or arrangement between a director and his company that the director should actually record his vote, where

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Where there would be no quorum without the presence of a director who is disentitled from voting on the contract he cannot be counted as being present for the purpose of making a quorum: *Yuill* v. *Greymouth & Point Elizabeth Ry. & Coal Co.* (1904) 1 Ch. 32; *Re D. & S. Drug Co., Donald's Claim* (1916) 10 W. W. R. 612 (Alta.). Nor, if several directors are interested in what is in reality one transaction, can a quorum be obtained by splitting the resolution into parts and taking a vote on each part separately: *In re North-Eastern Insurance Co.* (1919) 88 L. J. Ch. 121.

Where the articles of association of a company provided that a director might contract with a company but forbade his voting, and the director voted in favor of the resolution appointing him managing director at a remuneration, it was held that there was a contract between the director and the company within the meaning of the article, and that the appointment was irregular, but that it could be cured by a vote of the company in general meeting: *Foster* v. *Foster* (1916) 1 Ch. 532; 85 L. J. Ch. 305. But see the view expressed by Idington, J., in *Wade* v. *Kenrick* (1906) 37 S. C. R. 32, at p. 53. See also *Re Owen Sound Lumber Co.* (1917) 33 D. L. R. 487; 38 O. L. R. 414.

Disclosure. There must be full disclosure by the director of his interest: *Costa Rica* v. *Forwood* (1900) 1 Ch. 756; and if there is full disclosure and assent by the company the director can retain his profit: *A. G.* v. *Standard Trust* (1911) A. C. 498; *Bennett* v. *Havelock* (1910) 21 O. L. R. 120; (1912) 25 O. L. R. 200.

The duty to make full and complete disclosure is a fiduciary burden which can not be got rid of by resigning from the board on the understanding that the resignation is to be contemporaneous with the formal execution of the contract: *Denman* v. *Clover Bar Co.* (1913) 48 S. C. R. 318; 15 D. L. R. 241. Though the contract be declared not binding on the company the

director may be awarded compensation on a *quantum meruit* for the services rendered the company on the faith of the contract set aside, *ibid.* Secs. 80-81.

The duty to disclose may extend not only to present but to future shareholders where it is intended to bring in new shareholders by issuing shares to the public, *ibid.* See also *Re Hess Mfg. Co., Edgar* v. *Sloan* (1894) 23 S. C. R. 644.

Directors may lend money to the company and take security therefor and enforce payment as ordinary creditors, but such contracts must be made with the utmost good faith and are subject to the severest scrutiny: *Neelon* v. *Town of Thorold* (1891) 20 O. R. 86; (1894) 22 S. C. R. 390.

See also on contracts between the directors and the company *Ellis* v. *Norwich Broom and Brush Co.* (1906) 8 O. W. R. 25; *Re Norwalk Mining Co.* (1915-6) 9 O. W. N. 41; Annotation in (1912) 7 D. L. R. 111.

Sales by directors to the company.

Where a director is selling to the company property which is his own in equity and law, if the company claims an interest in the property by reason of the transaction it can only do so by affirming the sale, which though voidable becomes validated. The company can refuse to affirm the contract and the contract will be set aside and the parties remitted to their original rights, but the company can not, if rescission is no longer possible, keep the property and make the director take less than the price agreed: *Burland* v. *Earle* (1902) A. C. 98; *Ruethel* v. *Thorpe* (1907) 9 O. W. R. 942; (1907) 10 O. W. R. 222.

On the other hand if the director has made no disclosure to the company the latter can at its option either rescind the contract or retain the property and recover damages for the loss arising through non-disclosure: *Gluckstein* v. *Barnes* (1900) A. C. 240; *Leeds & Hanley, &c.* (1902) 2 Ch. 809.

Where the director is dealing with property which though his own in law, was originally acquired by him under circumstances which made it in equity the property of the company, the company can in such a case

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treat the profit on the resale to it as acquired on its behalf and make the agent account for it. This rule only applies when the fiduciary relationship exists at the time of the acquisition of the property by the agent: *Jacobus Marler Estates, Lim.* v. *Marler* (1916) 85 L. J. P. C. 167.

Even where the company is not entitled to treat the property itself or the director's profit on the resale as acquired on the company's behalf, and is unable to restore the agent to his original position, and has accordingly lost the right to repudiate the transaction, it may still have a remedy in damages against the director for negligently allowing the company to purchase the property at the price specified. The measure of damages is the difference between the market value and the price paid if the property has a market value; if it is specific property having no market value the measure of damages will be the company's loss in the whole transaction, and the Court will fix a proper price between vendor and purchaser and estimate the damages on the basis of such price: *Jacobus Marler Estates, Lim.* v. *Marler* (1916) 85 L. J. P. C. 167.

Action to set aside contract

An action to set aside a contract between a director and the company or to make a director account for profits should primarily be brought by the company itself, or at any rate the company should be a party: *Bennett* v. *Havelock Electric, &c., Co.* (1910) 21 O. L. R. 120, at p. 125; *Meyers* v. *Cain* (1905) 6 O. W. R. 834; except where the persons against whom relief is claimed control the majority of the shares of the company and will not permit the action to be brought in the name of the company: *Burland* v. *Earle* (1902) A. C. 83, at p. 93. The Court may, however, in a proper case, amend the pleadings or treat them as amended, so as to enable relief to be given where the company has not been made a party: *Allen* v. *Hyatt* (1914) 17 D. L. R. 7. See also *Johnston* v. *Carlin* (1914) 20 B. C. R. 520.

3. Powers of directors.

Powers.

In addition to the implied general authority given by s. 72, which provides that the affairs of the company

shall be managed by the board, s. 80 of the Act gives to the directors the full powers of the company, subject to certain limitations. The directors can do anything that the company can do, and if it is wished to be known whether a particular transaction is within the powers of the directors, it is simply necessary to examine the statute, charter and by-laws to see if there is an express provision requiring the authority of a general meeting of the shareholders. If there is not, the directors will have ample power: *Re Patent File Co.* (1870) L. R. 6 Ch. 83; *Pyle Works No.* 2 (1891) 1 Ch. 173. Secs. 80-81.

The introductory words of s. 80 confer on the directors a general power enabling them to enter into transactions for carrying on the ordinary business of the company. The directors may thus, for example, give to the company's bankers securities for advances under the Bank Act without complying with the provisions of s. 69: *Trusts and Guarantee* v. *Abbott Mitchell* (1906) 11 O. L. R. 403.

As these powers are given to the directors, the management of the business cannot be exercised by the shareholders, nor can the directors be overruled or controlled by the shareholders: *Quebec Agricultural Implement Co.* v. *Herbert* (1874) 1 Q. L. R. 363; *Cann* v. *Eakins* (1890-1) 23 N. S. R. 475; *Dunsmuir* v. *Colonist* (1900-3) 9 B. C. R. 290; *Automatic Self Cleansing Filter Syndicate* v. *Cunningham* (1906) 2 Ch. 34. If the shareholders are dissatisfied they can appoint a new board at the next election of directors, or appeal to the courts if the directors are committing a breach of trust. See *Taylor* v. *Chichester Ry. Co.* (1867) L. R. 2 Ex. 356.

The power to pass by-laws being given to the directors with respect to the matters mentioned in s. 80, the power of the shareholders to deal with the same matters is apparently excluded, except by way of considering by-laws previously passed by the directors: *Stephenson* v. *Vokes* (1896) 27 O. R. 691, 696; *Duns-* By-laws—powers of shareholders excluded.

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muir v. *Colonist* (1900-3) 9 B. C. R. 290; *Beaudry* v. *Read* (1907) 10 O. W. R. 622, 625; *Kelly* v. *Electrical* (1908) 16 O. L. R. 232; *Cann* v. *Eakins* (1890-1) 23 N. S. R. 475; *Colonial* v. *Smith* (1912) 4 D. L. R. 814; 22 Man. L. R. 441.

Some authorities have argued that the use of the term "by-laws of the company" in ss. 8 and 45 of the Act indicates that the shareholders have the right to initiate shareholders' by-laws, as distinguished from directors' by-laws, which must be passed by the directors and confirmed by the shareholders. See *Sherker* v. *Rudner* (1911) Q. R. 39 S. C. 44, 47; but this view seems to be in conflict with the case of *Good & Shantz* (1911) 23 O. L. R. 544.

Powers vested in the board.

The powers of the directors are vested in them collectively and must be exercised at the regular meetings of the board, or as provided by the by-laws, etc., and not by the directors acting individually: *Schmidt* v. *Beatty* (1916) 10 O. W. N. 230; *Standard Construction Co., Ltd.* v. *Crabb* (1914-5) 30 W. L. R. 151; 7 W. W. R. 719; *Bent* v. *Arrowhead* (1909) 18 Man. L. R. 633; *Swayze* v. *Grobb* (1915) 8 O. W. N. 316; *Almon* v. *Law* (1893-4) 26 N. S. R. 340. See further, *infra,* under "exercise of powers" by directors.

Examples of powers.

The following are examples of powers which the directors may exercise under their general authority.

Appointments.

Even without express power it is the right of the directors to appoint necessary officers and agents and to provide for the manner of their payment: *Falkiner* v. *Grand Junction Ry.* (1883) 4 O. R. 350. And although the directors may go out of office and new directors be elected at the end of each year, they may engage managers and other officials for terms extending over a much longer period: *Howarth* v. *Singer Mfg. Co.* (1893) 8 A. R. 264, 270.

Power to compromise.

The directors being the active representatives of the company, may in a proper case exercise a power of compromise: *Bath's Case* (1878) 8 Ch. D. 334, but as to powers in respect of a subscription for shares when the validity of the subscription itself is contested see *Fuches* v. *Hamilton Tribune* (1885-6) 10 O. R. 497.

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Arrangements with creditors.

The directors of a company have the right to assign the property of the company to a trustee for the benefit of the company's creditors, without the formal sanction of the whole body of shareholders: *Hovey* v. *Whiting* (1886) 14 S. C. R. 515; see also *Re Olympia Co.* (1915) 25 D. L. R. 620. The directors have unlimited powers over the property of the company so to deal with it as to pay the just debts of the corporation: *Hovey* v. *Whiting, supra,* per Ritchie, C.J., at p. 520. Directors may, without the sanction of the shareholders, make an acknowledgment of the company's insolvency for winding-up: *Re Manitoba Commission Co.* (1912) 2 D. L. R. 1.

Raising money.

The depositing of goods in a warehouse by a manufacturing mercantile corporation and the raising of money on the security of the same is often such a matter as would fall within the competence of the directors to cause it to be done through their manager: *Merchants Bank* v. *Hancock* (1883) 6 O. R. 285, 290; *Gibbs & West's Case* (1870) L. R. 10 Eq. 312; *Pickering* v. *Ilfracombe Ry.* (1868) L. R. 3 C. P. 235. In the case of a bank, it has been held that the directors may take such steps as seem necessary to protect its interest and to obtain advances: *Re Ontario Bank* (1910) 21 O. L. R. 30, affirmed *sub nom.; McFarland* v. *Bank of Montreal* (1911) A. C. 96.

Contracts.

The directors may enter into a contract on behalf of the company, notwithstanding that its full performance would require an increased plant, but not if the increased plant had been required to carry on a new or different business: *National Malleable* v. *Smith's Falls* (1907) 14 O. L. R. 22, at pp. 28 and 29.

Other examples.

The directors may accept a conditional bonus granted by a municipality: *Commercial Rubber* v. *St. Jerome* (1908) Q. R. 17 K. B. 275; they may defend an action in the name of the company: *Campbell* v. *Taxicabs* (1912) 7 D. L. R. 91; contract a hypothec which will be binding on the company: *Savaria* v. *Paquette* (1901) Q. R. 20 S. C. 314; select investments for the company subject to the control of a general meeting:

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Burland v. *Earle* (1902) A. C. 83; sell all the company's land, if the same is in their honest opinion advisable: *Ritchie* v. *Vermillion* (1901) 1 O. L. R. 654, at p. 657, per Street, J., whose judgment was affirmed (1902) 4 O. L. R. 588.

The defendants in a deed of assignment covenanted that certain mortgages were good and valid charges on lands, and that the defendants had not done or permitted any act, etc., whereby the mortgages had become released or discharged in part or in entirety. It appeared that certain of the lands comprised in these mortgages had been sold for taxes. Held, that the covenant was not *ultra vires* of the company or of the directors; and that the plaintiffs were entitled thereunder to recover the value of the lands so sold: *Real Estate Investment Co.* v. *Metropolitan Building Society* (1883) 3 O. R. 476.

Borrowing.

The borrowing powers of directors are dealt with in the notes to s. 69.

Termination of powers

The powers of directors cease on the appointment of a liquidator under the Winding-up Act, R. S. C. 144, s. 31, except in so far as the Court or the liquidator sanctions the continuance of such powers. See *Chatham National Bank* v. *McKeen* (1895) 24 S. C. R. 348.

Ratification of *ultra vires* acts of directors.

Acts which are *ultra vires* of the board, but not beyond the powers of the company, may be subsequently ratified by the shareholders: *Adams & Burns* v. *Bank of Montreal* (1899) 8 B. C. R. 314; (1901) 32 S. C. R. 719. See also *National Land* v. *Rat Portage Lumber Co.* (1917) 36 D. L. R. 97. There can be no ratification of an illegal action or where the company is not fully informed: *Rountree* v. *Sydney* (1908) 39 S. C. R. 614.

Where a director was procuring a meeting of the shareholders to be called for the purpose of confirming alleged illegal acts on his part, a motion for an injunction to restrain him from doing so was dismissed, it not having been made clear that the acts complained of were *ultra vires* of the company: *McClure* v. *Langley* (1916) 10 O. W. N. 32.

Where individual directors professing to act on behalf of the company enter into an engagement, which is not in the ordinary course of its business, the company is not bound unless it ratifies it: *Hamilton & Port Dover Ry.* v. *Gore Bank* (1873) 20 Gr. 190, 194; *Reuter* v. *Electric Telegraph* (1856) 6 E. & B. 341. Secs. 80-81. Ratification.

But such acts of directors may be ratified expressly or by acquiescence. If the company elects to repudiate it should make known its election promptly, so that the person with whom its agent has dealt may remain as short a time as possible subject to an unequal bargain. If it delays after the lapse of sufficient time for enquiry and deliberation, it will be taken to have acquiesced, and even slight acts referable to the contract will be deemed an adoption of it: *Conant* v. *Miall* (1870) 17 Gr. 574, 580.

See *Merchants Bank* v. *Hancock* (1883) 6 O. R. 285; *Bridgewater Cheese Co.* v. *Murphy* (1896) 23 A. R. 66; *Hereford R. Co.* v. *The Queen* (1894) 24 S. C. R. 1.

4. Delegation.

In the absence of any express or implied power enabling them to do so the directors can not delegate their powers: *Cobb* v. *Becke* (1845) 6 Q. B. 936. The Act confers no authority on the directors to delegate their general powers of management, and such of the powers of the directors as are expressly given to the board by the Act can not be delegated, *e.g.*, allotting stock or making calls: *Re Bolt & Iron Co. Hovenden's Case* (1884) 10 P. R. 434; *Re Pakenham Pork Packing Co.* (1906) 12 O. L. R. 100. But where a company gives to an employee power over all the administration of the business of the company subject only to such direction and control as it is the duty of the directors to exercise, that is not an *ultra vires* delegation of the directors' authority by the company: *Montreal Public Service Co.* v. *Champagne* (1917) 33 D. L. R. 49 (P. C.).

Nor can the directors delegate to an executive committee of their number the supervision of the company's affairs generally: *Monarch Life* v. *Brophy* Executive committee.

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(1907) 14 O. L. R. 1; *Tanguay* v. *Royal Paper Mills* (1907) Q. R. 31 S. C. 398.

Executive committee.

The department has recently refused to permit a power of appointing an executive committee to be taken in the letters patent. Possibly, if the by-laws so provide, such of the powers of the board may be delegated to an executive committee as are not expressly required by the Act to be exercised by the full board. See the notes to s. 32.

Where the articles of the company enabled the board of directors to appoint a committee of their own number and to delegate to any such committee all or any of the powers of the board, and one of the directors was appointed a committee with all the powers of the board, it was held that the delegation was valid and that a committee in such a case need not consist of more than one person: *Re Taurine Co.* (1883) 25 Ch. D. 118.

If the directors delegate their powers to a committee without fixing a quorum of the committee, all of the members of the latter must be present to give effect to what they do: *Re Liverpool Household Stores Ass'n* (1890) 59 L. J. Ch. 624.

Agents, officers and servants.

Section 80 (d) enables the directors to pass by-laws as to the appointment of agents, officers and servants.

It is generally necessary for directors to employ other persons to act for the company, and where this is the case those persons will also have power to bind the company within the limits of their agency; and as a rule their authority cannot be denied unless their employment was beyond the powers of the directors or irregularly made, and unless in the case of such irregularity, the person dealing with the employee had notice of the irregularity: *Thompson* v. *Brantford Electric Co.* (1898) 25 A. R. 340, 345. See the notes to s. 32.

A company is liable in damages to its general manager for breach of contract of employment if by resolution of the directors it materially lessens his authority under the contract and makes it impossible for him to

discharge his duties thereunder: *Montreal Public Service Co.* v. *Champagne* (1917) 33 D. L. R. 49 (P. C.). Secs. 80-81.

5. Exercise of powers—Meetings.

Meetings.

The directors must act at regularly constituted meetings, in the absence of express power in the by-laws to the contrary, and where the meetings are not held on definitely fixed days due notice must be given to all the directors: *Harben* v. *Phillips* (1883) 23 Ch. D. 14; *First Natchez Bank* v. *Coleman* (1903) 2 O. W. R. 358; *Harris* v. *English Canadian Co.* (1905) 3 W. L. R. 5. See also *O'Dell* v. *Boston* (1897) 29 N. S. R. 385; *Young* v. *Consumers' Cordage Co.* (1896) Que. 9 S. C. 471; *Re Cardiff Coal Co.* (1911) 18 W. L. R. 165.

Notice.

Such a notice must be given a reasonable time prior to the meeting of the board, but if all the directors should be present, insufficiency of notice will be immaterial: *Browne* v. *La Trinidad* (1888) 37 Ch. D. 1. The by-laws commonly provide that meetings may be held without formal notice if all the directors are present or those absent have signified their consent to the meeting being held in their absence. A letter from the president of the company purporting to waive notice on behalf of the absent directors is not a signification of consent within the meaning of such a by-law: *Canadian Ohio, &c., Co.* v. *Cochrane* (1914-5) 7 O. W. N. 698.

Receipt of notice itself can not be waived: *Re Portuguese Consolidated Copper Mines* (1889) 42 Ch. D. 160; but provisions as to giving notice must be construed reasonably, so that directors who are absent from the country are not entitled to notice of meetings even though there is a provision in the articles for payment of their travelling expenses: *Windsor, Ltd.* v. *Windsor* (1912) 17 B. C. R. 105; 3 D. L. R. 456.

Five of nine provisional directors of a railway company being a quorum, four of them met at Winnipeg pursuant to a valid notice under the statute, and adjourned to a day named, when six met at Toronto in alleged pursuance of adjournment, but without proper notice under the statute. Held, that the meeting of the six directors did not constitute a duly organized meet-

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ing of directors, though had all the directors who were at the meeting at Winnipeg attended pursuant to the adjournment it might have cured the irregularity: *McLaren* v. *Fisken* (1881) 28 Gr. 352.

Where a bare majority of the directors call a directors' meeting at a time that does not reasonably permit of the attendance of a full board, and not acting *bona fide* in the company's interests but for the purpose of retaining themselves in office, and improperly controlling the vote of shareholders' meetings pending, improperly issue stock to themselves, the parties to whom the shares are issued will be restrained from voting on them at the meetings: *Glace Bay* v. *Harrington* (1910-1) 45 N. S. R. 268.

See also on notice *Madden* v. *Dimond* (1904-7) 12 B. C. R. 80, 90.

Notice of business.

Notice of the business to be transacted at a directors' meeting, as distinguished from notice of the holding of the meeting, is not necessary. Directors at meetings of the board can deal with all the affairs of the company requiring their attention whether ordinary or not and previous notice of the special business is not a necessary condition of the proceedings being valid unless special provision to that effect is made in the charter or by-laws. In the case of extraordinary or special business it may be very prudent and right to give notice of it, but it is not legally necessary to do so: *La Compagnie de Mayville* v. *Whitley* (1896) 1 Ch. 788. The contrary opinion which had been previously expressed by Robertson, J., in *Waddell* v. *Ontario Canning Co.* (1889) 18 O. R. 41, is not likely to be followed in Canada.

Personal attendance necessary.

The directors must meet in person: *Harris* v. *English Canadian Co.* (1905) 3 W. L. R. 5, and a director's vote cannot be cast by proxy at a meeting of the board: *Re Portuguese Consolidated Co.* (1889) 42 Ch. D. 160, 165.

Chairman.

If the chairman is to have a casting vote at meetings the by-laws or the statute must so provide: *Toronto Brewing, &c. Co.* v. *Blake* (1883) 2 O. R. 175, per Proudfoot, J., at p. 184.

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Minutes.

The proceedings of the meetings of directors should be recorded in the directors' minute book. As such a book is not required to be kept by ss. 89 and 90, entries therefrom would not be *prima facie* evidence of the facts therein stated under s. 107. Although there be no minutes of a resolution the Court may accept parol evidence as to what took place at a meeting and presume that a resolution was passed or other action taken: *In re Fireproof Doors, Ltd.* (1916) 85 L. J. Ch. 444; *Northwest Battery Co.* v. *Hargraves* (1913) 23 Man. R. 923; *Boston Shoe Co.* v. *Frank* (1915) 48 Que. S. C. 66. But see *Claudet* v. *The Golden Giant Mines* (1909) 15 B. C. R. 13.

Presence of strangers.

As to the effect of the presence of strangers at a meeting in the face of objection thereto by one of the directors, see *Harris* v. *English Canadian Co.* (1905) 3 W. L. R. 5.

Irregularities.

Rule in Royal British Bank v. Turquand.

As to the regularity of proceedings at meetings of directors, it should be remembered that while persons dealing with a company are presumed to have notice of the Act of Incorporation, the letters patent, and possibly the constituent by-laws of the company, they are not bound to inquire into the regularity of its "indoor management." They may presume that its internal management is regular, and, for example, one lending to a company which has power to borrow with the sanction of a general meeting is not put on inquiry as to whether that sanction has been given in the prescribed way: *Royal British Bank* v. *Turquand* (1856) 6 E. & B. 327; *Bargate* v. *Shortridge* (1855) 5 H. L. C. 318; *Montreal & St. Lawrence, &c., Co.* v. *Robert* (1900) A. C. 196; *Goulet* v. *Hydraulic Co. of Portneuf* (1917) Que. 52 S. C. 58. On this point see notes to s. 69.

But apart from the rule in *Royal British Bank* v. *Turquand*, an act done by a majority of the directors informally and privately is not, in the absence of express authorization, binding on the company. Thus, where the secretary had fixed the seal of a company to a bond after obtaining the authority of two directors privately, and the promise of the third to sign an

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authorization, it was held that the bond was void: *D'Arcy* v. *Tamar, etc., Ry. Co.* (1867) L. R. 2 Ex. 158; 14 W. R. 96; *Re County Life Ass. Co.* (1870) L. R. 5 Ch. 288; *In re Haycraft, &c.* (1900) 2 Ch. 230; *Paul* v. *Kobold* (1905) 2 W. L. R. 90, 95.

Where directors have acted irregularly and there is notice of the irregularity in the proceedings, the rule in the Turquand Case does not apply: *Howard* v. *Patent Ivory Co.* (1888) 38 Ch. D. 156. Nor does the rule apply as between the company and an officer thereof: *Courchène* v. *Viger Park Co.* (1915) 24 Que. K. B. 97; 23 D. L. R. 693.

Quorum.

The acts of directors at meetings where there is not a quorum are voidable by the company, subject, of course, to the rule in the Turquand Case, *supra*. But where a quorum is present at a meeting, a majority of those present and constituting the quorum, may validly act for the company: *Withnell* v. *Gartham* (1795) 6 T. R. 388; *Rex* v. *Bower* (1823) 1 B. & C. 492; *Cortis* v. *Kent Water Works* (1827) 7 B. & C. 314; but as to the effect of a provision such as that contained in s. 72 of the Act that the affairs of the company shall be managed by a board of not less than a fixed number of directors; see Lindley on Companies. 6th ed., vol. 1, p. 205, and *Card* v. *Carr* (1856) 1 C. B. N. S. 197; *Ex p. Birmingham Banking Co.* (1868) L. R. 3 Ch. 651, and notes to s. 72, *supra*.

When the by-laws do not prescribe the number of directors required to constitute a quorum the number who usually act in conducting the business of the company may constitute a quorum, and in such a case a forfeiture of shares by two directors present out of a board of six was held valid: *Lyster's Case* (1867) L. R. 4 Eq. 233.

See also *In re Fireproof Doors, Lim.* (1916) 85 L. J. Ch. 444. Directors disentitled from voting by reason of being interested in a contract before the meeting for its consideration can not be counted towards making a quorum: *Yuill* v. *Greymouth Point Elizabeth Co.* (1904) 1 Ch. 32; *Re D. & S. Drug Co.; Donald's Claim*

(1915) 10 W. W. R. 612 (Alta.). In *International Mining Syndicate* v. *Stewart* (1914) 48 N. S. R. 172, it was held that two out of four provisional directors constituted a quorum, where one forfeited his shares and the other refused to attend, having acquired interests adverse to the company. Secs. 80-81.

One director cannot constitute a meeting: *Re D. & S. Drug Co.* (1915) 10 W. W. R. 612 (Alta.).

Resolutions.

The formal acts of the directors at meetings of the board are expressed in the form of resolutions or by-laws. In some cases, *e.g.*, borrowing of money (s. 69) increase of capital (s. 51) and change of head office (s. 76) a by-law is required, otherwise a resolution will suffice. The distinction between a resolution and a by-law is that a "resolution applies to a single act of the corporation, while a by-law is a permanent continuing rule, which is to be applied to all future occasions": Thompson on Corporations, 2nd ed., vol. 1, s. 977, quoted in *Mackenzie* v. *Maple Mountain, &c., Co.* (1910) 20 O. L. R. 615, at p. 618 by Osler, J.A., who held that while a resolution is not necessarily a by-law, a by-law may be enacted in the form of a resolution, where the object to be accomplished is the subject of a by-law, *i.e.*, a rule of law of the corporation for its government. In actual practice the distinction is not always apparent, *e.g.*, where an executive officer is appointed by by-law or a specific borrowing is authorized under s. 69.

See also *Denault* v. *Stewart* (1918) Que. 54 S. C. 209.

By-laws.

Where the powers of the directors with reference to the subject matters enumerated in ss. (a) to (g) of s. 80 are exercised by by-law, such by-laws except those respecting agents, officers and servants of the company, have force (unless in the meantime confirmed at a general meeting) only until the next annual meeting of the shareholders. Unless such by-laws are then confirmed they thereupon cease to be valid, s. 81.

The power of the directors to pass by-laws under the section is subject to the further restriction that

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such by-laws must not be contrary to law, *e.g.*, by providing for the issue of shares at a discount: *North-West Electric Co.* v. *Walsh* (1898-9) 29 S. C. R. 33; or to the letters patent, where these contain special provisions; or to Part I of the Act, *e.g.*, by providing for the payment of dividends which would impair the capital of the company, which is forbidden by s. 70 of the Act.

The power to pass by-laws being given to the directors the shareholders are precluded from doing so: *Beaudry* v. *Read* (1907) 10 O. W. R. 622, 625; *Mackenzie* v. *Maple Mountain, &c., Co.* (1909) 20 O. L. R. 170, 172, 173; *Kelly* v. *Electrical Construction Co.* (1908) 16 O. L. R. 232; *Colonial* v. *Smith* (1912) 22 Man. L. R. 441; 4 D. L. R. 814.

6. Personal liability of directors.

"If directors act within their powers; if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience —and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to the company": *In re National Bank of Wales* (1899) 2 Ch. 629, per Lindley, M. R., in the Court of Appeal adopting the statement of the law laid down in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (1899) 2 Ch. 392.

Directors are bound to use a fair and reasonable diligence in the management of the company's affairs, and to act honestly, but they are not bound to do more: *Re Forest of Dean Coal Co.* (1879) 10 Ch. D. 450, 452; *Northern Trust Co.* v. *Butchart* (1917) 35 D. L. R. 169. Middleton, J., in *Re Owen Sound Lumber Co.* (1915) 34 O. L. R. 528, at pp. 529 and 530, laid down a more stringent rule, stating that more than honesty is required and that reasonable intelligence and diligent attention to business are also essential. This statement was commented on by Hodgins, J.A., in the Appellate Division (1916-7) 38 O. L. R. at pp. 421 and 422, where it was suggested that this was rather a counsel

of perfection than an accurate statement of the true position of directors. See also *Prefontaine* v. *Grenier* (1907) A. C. 101, at p. 111; *Northern Trust* v. *Butchart* (1917) 35 D. L. R. 169; *Stavert* v. *Lovitt* (1907-8) 42 N. S. R. 449. Secs. 80-81.

Directors are liable for active misfeasance in office: *Re Lake Ontario Navigation Co., Hutchinson's Case* (1909) 3 O. W. R. 1037 and see the notes to s. 123 of the Winding-up Act, *infra*.

A director is not bound to bring any special qualifications to his office: *In re Brazilian Rubber, &c., Limited* (*No.* 1) (1911) 1 Ch. 425, and a provision in the articles to relieve directors from the consequence of negligence not dishonest will be valid, *ibid.*

Misfeasance.

Directors who are a party to a fraud or the commission of any other wrong are personally liable on the general principle that a servant or agent who commits a wrong is liable for damage resulting as well as his principal. But an innocent director is not liable for the fraud of a co-director in issuing to the shareholders false and fraudulent reports. "A director cannot be held liable for being defrauded by his co-director; to do so would make his position intolerable." A director is not bound to examine minutely each of the company's books, nor is the doctrine of constructive notice to be so extended as to impute to him a knowledge of the contents of the books: *Re Denham & Co.* (1883) 25 Ch. D. 752; *Land Credit Co. of Ireland* v. *Lord Fermoy* (1870) L. R. 5 Ch. 772.

Directors will not be personally liable when they have been misled by misrepresentation or concealment by the regularly authorized executive officers of the company where there was no reason to doubt their fidelity: *Prefontaine* v. *Grenier* (1907) A. C. 101, 109; *Rance's Case* (1870) L. R. 6 Ch. App. 104, 118. See also *Prudential Trust Co.* v. *McQuaid* (1919) 45 D. L. R. 346. Thus they are not bound to verify the calculations of the company's auditors: *Dovey* v. *Cory* (1901) A. C. 477, 486.

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Negligence.

Directors will be liable for acts of gross negligence: *Northern Trust* v. *Butchart* (1917) 35 D. L. R. 169; *Stavert* v. *Lovitt* (1907-8) 42 N. S. R. 449, but a mere default of judgment or error in a matter of discrimination is not negligence, and directors were held not liable for an improvident loan to one of themselves: *Turquand* v. *Marshall* (1869) L. R. 4 Ch. 376. It was there said that whatever may have been the amount lent to anybody and however ridiculous and absurd the conduct of the directors might seem, it was the misfortune of the company that they trusted such unwise directors, and to fix them with liability something more must be alleged, as for instance that the lending was fraudulent and improper.

Directors have a large discretion, and while acting honestly within it cannot be charged with misfeasance. Thus, when a director was cognizant that promotion money had been improperly paid on the formation of a company, but took no steps to recover the money for the company, it was held that he was not liable for his misfeasance: *Re Forest of Dean Coal Mining Co.* (1878) 10 Ch. D. 450. Similarly when in their discretion directors allowed calls to remain unpaid they were not held liable: *Re Liverpool Household Stores,* 59 L. J. Ch. 618.

A director who does not really exercise his judgment will be liable: *In re New Mashonaland Exploration Co.* (1892) 3 Ch. 577. Where the alleged misfeasance is neither *ultra vires,* nor fraudulent nor dishonest, failure on the part of the directors really to exercise their judgment as such and actual loss or damage to the company must be shown, *ibid.*

If directors adopt a system of doing business which ignores a factor which by statute ought to be a part of that system (*e.g.,* the obligation to keep company funds and trust funds distinct) that will constitute such negligence as will impose liability if loss is shown to have resulted: *Re Dominion Trust Co.* (*Directors' Case*) (1917) 32 D. L. R. 63.

The liability of directors *de facto* is the same as where they are regularly appointed: *Coventry and Dixon's Case* (1880) 14 Ch. D. 660, at 670 and 673; *Re Owen Sound Lumber Co.* (1915) 34 O. L. R. 528; (1916-7) 38 O. L. R. 414; *Macdonald* v. *Drake* (1902) 16 Man. R. 220 (liability for wages); *Northern Trust* v. *Butchart* (1917) 35 D. L. R. 169.

De facto directors.

A director is not bound to take any definite part in the conduct of the company's business: *In re Brazilian, &c., Ltd.* (*No.* 1) (1911) 1 Ch. 425, and a director who takes no part therein will escape liability: *Re Dominion Trust Co., Directors' Case* (1917) 32 D. L. R. 63. So far, however, as he does undertake it he must exercise reasonable care: *In re Brazilian, &c., Ltd., supra.*

Effect on liability of non-intervention in company's affairs.

A director is not bound to attend any meeting of the board, but gross inattention to the business of the directors may amount to a breach of trust. An ordinary director who only attends at the board occasionally cannot be expected to devote as much time and attention to the books as the sole managing partner of an ordinary partnership: *Re Forest of Dean Coal Mining Co.* (1878) 10 Ch. D. 450. See also *Marzetti's Case,* 28 W. R. 541; *Re Faure Accumulator Co.* (1888) 40 Ch. D. 150; *Sheffield & South Yorkshire, etc., Society* v. *Aizlewood* (1889) 44 Ch. D. 412; *In re National Bank of Wales* (1899) W. N. 131, (1899) 2 Ch. 629; *Marquis of Bute's Case* (1892) 2 Ch. 100.

Directors who were only present at a directors' meeting which confirmed the minutes of the meeting at which the improper application of funds was resolved upon cannot be thereby held to concur in the improper application: *In re Lands Allotment Co.* (1894) 1 Ch. 616.

Similarly where a director did not authorize or direct the payment out of the company's moneys in illegal commissions, except in one instance where he joined in signing a cheque "on account of commission," he was held to be liable only for the amount of such cheque: *Re Monarch Bank of Canada* (1910) 22 O. L. R. 516. And see *Crawford* v. *Bathurst Land, &c.,*

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Co. (1918) 42 O. L. R. 257; reversed (1920) 50 D. L. R. 457.

Effect of resignation.

When a director resigns his office and his resignation is accepted by the board, his responsibility for further acts of the board is at an end; so if his name were to appear as one of the directors in reports issued by the board, he having taken no part in their preparation or in advising the business with which they deal, he would not be liable for the statements contained in them, or, if the matters dealt with were the payment of a dividend, for the recommendation of the dividend, even though he knew his name appeared in the reports: *In re National Bank of Wales* (1899) W. N. 131; (1899) 2 Ch. 629.

Ultra vires acts.

Directors who act in excess of their authority are in some cases held liable to those with whom they deal on an implied warranty of their authority: *Firbanks* v. *Humphreys* (1886) 18 Q. B. D. 54; *Chapleo* v. *Brunswick, etc.* (1881) 6 Q. B. D. 715.

An action lies against an agent upon an implied warranty of authority in *fact,* but not upon an implied representation of authority in *law,* to do an act: *Beattie* v. *Lord Ebury* (1872) L. R. 7 Ch. 777.

And a representation by a director, founded on a mistaken view of the extent of his authority in point of law, will not render him liable to the person to whom it was made: *Struthers* v. *Mackenzie* (1897) 28 O. R. 381.

Thus, where a company or association was prohibited by the statute incorporating it from purchasing goods on credit, the directors who authorized the illegal purchase, but without any express warranty or representation of the authority of the association to buy on credit, were held not to be liable upon an implied representation or warranty: *Struthers* v. *Mackenzie, supra.*

As to bills and notes, see *Madden* v. *Cox* (1880) 5 A. R. 473; *Brown* v. *Howland* (1885) 9 O. R. 48; 15 A. R. 750; *Walmsley* v. *Rent Guarantee Co.* (1881) 29 Gr. 484; *Thames Navigation Co., Limited* v. *Reid* (1886) 13 A. R. 303.

Where there has been some mis-application of the funds of the company to purposes which are *ultra vires* of the company, this is regarded as a breach of trust for which the directors guilty of it will be held personally liable: *Stringers' Case* (1869) L. R. 4 Ch. 475. Secs. 80-81.

Directors acting only partially *ultra vires* and in the true and reasonable belief that they are acting in the interests of the company, are not chargeable with "*dolus malus*" or breach of trust merely because in promoting the interests of the company they are also promoting their own, or because they afterwards sell shares at prices which give them large profits: *Hirsche* v. *Sims* (1894) A. C. 654.

The creditors of a limited company are entitled to have the capital of the company preserved for the payment of their claims; consequently the payment by the directors to the shareholders of the whole or any part of the capital in the form of dividends or otherwise is *ultra vires* and a breach of trust, and the directors jointly and severally may be ordered to make good the amount of capital so paid; but, in case the repayment has been made with the sanction of the shareholders, without prejudice to their right to recover from each shareholder the amount of capital he has received: *Re National Funds Assurance Co.* [1878] 10 Ch. D. 118. See also *Flitcroft's Case* (1882) 21 C. D. 519; *Re Sharpe* [1892] 1 Ch. 154; *London and General Bank* (2) [1895] 2 Ch. 673; *Postage Stamp, etc., Co.* [1892] 3 Ch. 566; *George Newman & Co.* [1895] 1 Ch. 674. In such a case a director who has paid damages may seek contribution from his co-directors who participate in the breach of trust: *Re Anglo-French Society* (1882) 21 Ch. D. 501; *Ramskill* v. *Edwards* (1885) 31 Ch. D. 100. See further, notes to s. 70. Dividends.

Directors may also be liable to outsiders for their own wrongs, *e.g.*, fraud: *Re Traders' Trust Co. & Kory* (1916) 26 D. L. R. 41; *Parker* v. *McQuesten*, 32 U. C. R. 273; or breach of trust: *Brenes & Co.* v. *Downie* (1914) S. C. 97—Ct. of Sess. Liability in tort.

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The liability of directors to subscribers in an action for deceit or for compensation for mis-statements in the prospectus has been considered, *supra,* under s. 43.

Criminal liability.

For criminal liability of directors see *Rex* v. *Hendrie* (1906) 11 O. L. R. 202, where it was held that more than mere acquiescence was required to make them liable under ss. 197 and 198 of the Criminal Code; see also *Rex* v. *Hays* (1907) 14 O. L. R. 201.

Wages.

As to personal liability for wages, see s. 85, *infra.*

Wrongful payment of dividends.

For liability of directors on account of wrongful payment of dividends, see notes to ss. 70, 71 and 82 of the Act, and s. 123 of the Winding-up Act.

Indemnity for actions.

As to indemnification of directors against costs incurred in suits respecting the execution of their office, and generally, see s. 79, and notes.

Penalties.

See notes to ss. 116 ff as to offences and penalties.

Penalties are imposed by the following among other sections **for an infraction of their** provisions: 43A 5 (prospectus issued without a copy being filed); 54E (penalty for concealing name of creditor on reduction of capital); 69G, 69H, 69I, 69J (penalties for non-compliance with provisions of s. 69); 92 (5), 93 (3) (inspection); 94B (5) (issuing copy of balance sheet without complying with section); 106 (3) (annual returns).

Failure to use "Limited."

See sec. 33, *supra;* 1; s. 115, *infra.*

A bill of exchange drawn by the plaintiffs upon the Burford Canning Company (Limited) was addressed to "The Burford Canning Co.," and accepted by the drawees by the signature, "The Burford Canning Co., Ltd." This was a few days after the royal assent had been given to the Ontario Act, 60 Vict., c. 28, s. 22 of which provided that in the case of contracts by limited liability companies the word "limited" should be written or printed in full, a previous statute, 52 Vict., c. 26, s. 2, having made the directors liable for the amounts due upon such contracts where the word "limited" did not appear after the name of the company where it first occurred in the contract. The writ of summons in this action (against the directors) was issued on the very day on which the royal assent was given to the Act, 61 Vict., c. 19, s. 4 of which suspended

the operation of the Act of the previous session. Held, that the use of the abbreviation "Ltd." was not a compliance with 52 Vict. c. 26, s. 2. Held also, that the address to the "Burford Canning Co." in the draft was the first place in which the name of the company appeared in the contract, but that the fact of its having been so written there by the plaintiffs did not disentitle them to recover. Held also, that no stay was created by 61 Vict., 19, s. 4, of any action but one brought under 60 Vict., c. 28, s. 22 (1), and the corresponding section of the revision of 1897, so that, upon this view of the effect of 52 Vict., c. 26, s. 2, the plaintiffs were entitled to recover. If, however, the use of the contraction "Ltd." was a compliance with the last mentioned section, the plaintiffs were still entitled to recover, because the contract was made some days after the passing of 60 Vict., c. 28, s. 22, which required the unabbreviated word "limited" to be used; and the plaintiffs, upon the execution of the contract by the Burford Canning Company (Limited), became and remained entitled to look to the directors personally, and had a vested right of action, with which the "stay" clause, s. 4 of 61 Vict., c. 19, could not interfere, there being nothing in it which required the court to hold it to be retrospective: *Howell Lithographic Co.* v. *Brethour* (1899) 30 O. R. 204. Secs. 80-81.

7. Remuneration.

Right to remuneration.

Prima facie directors of a company are not entitled to remuneration in the absence of statutory authority: *Hutton* v. *West Cork Ry. Co.* (1883) 23 Ch. D. 659, 672; *Roray* v. *Howe Sound* (1915) 22 D. L. R. 855.

But where a person has accepted the office of director of a company and has acted as such, there may be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration and benefits provided by the by-laws for the directors: *Re Anglo Austrian Co.* (*Isaac's Case*) (1892) 2 Ch. 158.

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Where the by-laws provide for remuneration it is a matter of internal management: *Burland* v. *Earle* (1902) A. C. 83, 101.

The right to remuneration is limited by the provisions of the charter and by-laws. Thus by-law 17 of the B. & I. Company provided that the managing director should be paid for his services such sums as the company "may from time to time determine at a general meeting." The only provision made at a general meeting was on 27th January, as follows: "The salary of the managing director was fixed until October 31st next, as at the rate of $4,000 per annum." L., the managing director, sought to recover for services rendered as such subsequent to October 31st. Held, that he could not do so: *Re Bolt and Iron Co.; Livingstone's Case* (1887) 14 O. R. 211; 16 A. R. 397.

And where a director withdraws sums in excess of the authorized remuneration, he is guilty of a breach of trust, *ibid.*

Unjustifiable payments as remuneration.

Where the remuneration is not justifiable by services rendered or by the state of the company's business, directors cannot vote the president a salary in order to permit him to acquire shares and gain control of the company: *Giguere* v. *Colas* (1915) Que. 48 S. C. 198. So also where there is no *bona fide* purpose of remuneration, but the intention on the part of the directors is to vote all the profits of the company to themselves for past service in capacities in which they had never been appointed, such action will not be upheld: *Gardner* v. *Canadian Manufacturing Co. Ltd* (1900) 31 O. R. 488. See also *Cook* v. *Hinds* (1918) 42 O. L. R. 273, judgment of Lennox, J.

Gratuities—Past services.

A company may vote gratuities to the directors where this is done as incidental to the carrying on of the company's business: *Hutton* v. *West Cork Ry Co.* (1883) 23 Ch. D. 654, 671-2; but not gifts to directors when the company's capital is impaired: *Crawford* v. *Bathurst Land &c., Co.* (1916) 37 O. L. R. 611, 638 and on appeal (1918) 42 O. L. R. 256, per Riddell and Rose,

JJ. This case was reversed by the Supreme Court of Canada, by a majority of three to two; (1920) 50 D. L. R. 457, but the judgments of the majority on this head went on the ground of personal disqualification of the plaintiff to bring the action and acquiescence. And it is submitted that the above qualification to the rule is settled by the decisions mentioned in the judgments in the above case. See also the judgment of Rose, J., in *Cook* v. *Hinds* (1918) 42 O. L. R. 273, 301. Secs. 80-81.

The Act does not deal with the question of granting remuneration for past services, but this may be done, at any rate where all the shareholders agree: *Bartram* v. *Birtwhistle* (1908) 15 O. L. R. 634, where a grant by the shareholders at an annual meeting to the treasurer of the company for his services during the past thirty years was upheld. This is a matter of internal economy, per Boyd, C., at p. 636. But a company can not expend its funds in payments to the directors for past services where the company has transferred its undertaking to another company and is being wound up: *Hutton* v. *West Cork Ry. Co.* (1883) 23 Ch. D. 654. See also *Stroud* v. *Royal Aquarium* (1903) 83 L. T. 243; *Warren* v. *Lambeth Water Works* (1904-5) 21 T. L. R. 685. So also where the articles of association authorized the payment, a bonus and salary for services rendered voted at a meeting at which all the shareholders were present could not be recovered back: *Macdonald* v. *Godson* (1916) 31 D. L. R. 363. See also *Cook* v. *Hinds* (1918) 42 O. L. R. 273 a case of remuneration for past services in which the judgment, however, went on other grounds.

Remuneration out of capital.

In England if the articles authorize it remuneration may be paid out of capital: *Re Lundy Granite Co.* (1872) 26 L. T. N. S. 673; and the same holds good under this Act if the letters patent so specify; *Re Publishers' Syndicate, Paton's Case* (1903)5 O. L. R. 392, 406. There is no general presumption that the fees of directors are to be paid out of profits only; *Re Lundy Granite Co., supra,* and directors can sue

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for the fees to which they are entitled: *Nell* v. *Atlanta Co.* (1894) 11 T. L. R. 407. However, in *Re Publishers' Syndicate, Paton's Case* (1903) 5 O. L. R. at p. 406, Maclaren, J. A., lays down the proposition that the remuneration of directors can only be given out of the assets properly divisible among the shareholders themselves and not out of capital, citing *In re George Newman* (1895) 1 Ch. 674, which was, however, a case involving gifts to directors: see per Lindley, L.J., at p. 686. Moreover, in the *Publishers' Syndicate Case* it did not appear that any services had been rendered and the statutory requirement of a by-law authorizing the remuneration had not been complied with. The case is accordingly not decisive on the question of the legality of the payment of remuneration out of capital where the company's by-laws authorize such payment. Probably such payment will be upheld provided sufficient assets remain to pay all creditors' claims in full.

By issuing paid-up shares.

The issuing by a company of paid up shares in its stock is a legitimate mode of paying a debt; cf. *Gardner* v. *Iredale* (1912) 1 Ch. 700; and in *Beaudry* v. *Read* (1907) 10 O. W. R. 622, Riddell, J., was apparently of the opinion that the issuing of paid up shares to directors by way of remuneration was unobjectionable provided the requirements of the governing statute were complied with (which had not been done in that case.)

Waiver and forfeiture.

Directors can by resolution postpone their right to remuneration not yet due: *In re London & Northern Bank* (1901) 1 Ch. 728; but see *In re Central de Kaap Gold Mines* (1899) 69 L. J. Ch. 18; W. N. 216, 235. Directors are entitled to "remuneration for their services," or "remuneration as directors," notwithstanding that they may also be receiving remuneration as receivers and managers in a debenture holders' proceeding, *In re South Western of Venezuela Ry.* (1902) 1 Ch. 701. See also *Victoria Mutual Fire Insurance Co.* v. *Thompson* (1882) 32 U. C. C. P. 476. Nor is a director's remuneration affected because his duties have diminished: *In re Consolidated Nickel Mines*

(1914) 1 Ch. 883; nor because there has been a shifting of duties, if it is clear that there was an intention that his remuneration should nevertheless continue: *Burland* v. *Earle* (1902) A. C. 83, 101. Secs. 80-81.

The rule applicable as regards forfeiture of the right to remuneration in the event of misconduct is, that where the duties are severable the agent, employee or director is entitled to remuneration in all cases where he has been honest, but is not entitled to it in all the instances where he has been dishonest: *Nitedals Taendstikfabrik* v. *Bruster* (1906) 2 Ch. 671; but where the duties are inseparable unfaithfulness even without fraud in the performance of any one of them will disentitle him to all remuneration. And in *Cook* v. *Hinds* (1918) 42 O. L. R. 273, it was held that the duties of directors, who were also managers and general superintendents of the company's business, were not severable so as to entitle them to remuneration in respect of their services as managers and superintendents, where they had been guilty of diverting business from the company, but this holding may perhaps depend on the peculiar facts of that case. Misconduct.

But misconduct on the part of an employee who is also a director does not disentitle him to salary previously earned: *Canada Bonded Attorney and Legal Directory* v. *Leonard-Parmiter, Ltd.* (1918) 42 O. L. R. 141; 42 D. L. R. 342.

Section 80 enables the directors to pass by-laws as to the remuneration of the directors (sub-sec. c.) and as to the remuneration of the agents, officers and servants of the company (sub-sec. d.). The former require confirmation in the absence of which they only have force until the next annual meeting; the latter do not, section 81. Necessity for a by-law.

Where the act requires a by-law a resolution will not suffice; *Gardner* v. *Canadian Mfg. Co. Ltd.* (1900) 31 O. R. 488, 493; *Re Ontario Express* (1898) 25 O. R. 587; *Birney* v. *Toronto Milk Co.* (1903) 5 O. L. R. 1; *Bartlett* v. *Bartlett Mines* (1911) 24 O. L. R. 419. The power to pass the by-law being given to the directors

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the shareholders are deprived of the right of doing so: *Beaudry* v. *Read* (1907) 10 O. W. R. 622, 625; *Mackenzie* v. *Maple Mountain &c., Co.* (1909) 20 O. L. R. 170, 172, 173. Accordingly directors are not entitled to remuneration in the absence of a by-law. See cases *supra.* The same applies to the higher executive officers of the company, such as the president: *Queen City Plate Glass Co.* (1909-10) 1 O. W. N. 863; or the managing director: *Benor* v. *Canadian Mail Order Co.* (1907) 10 O. W. R. 899, 1091. But a director is not precluded from receiving a reasonable remuneration for services rendered in another and subordinate capacity, even though a by-law authorizing the payment has not been passed: *Canada Bonded Attorney &c. Ltd.* v. *G. F. Leonard* (1918) 42 D. L. R. 342; 42 O. L. R. 141; *Re Matthew Guy &c. Co.* (1912) 26 O. L. R. 377; 4 D. L. R. 764; but compare *Cook* v. *Hinds* (1918) 42 O. L. R. 273.

In *Fullerton* v. *Crawford* (1920) 50 D. L. R. 457, Duff, J. (with whom the Chief Justice concurred) in considering the effect of section 92 of the Ontario Act, which makes the existence of a by-law confirmed by the shareholders or initiated by them a condition precedent to remuneration of directors, said: 'I am inclined to concur in the view that this section does not contemplate special payments of the character here in question, which are not made by way of remuneration for services of a director as a director, but special allowances made on some other ground.' And Anglin, J., held that remuneration for the services of a director there in question, rendered as agent for the company in effecting a sale of its lands, did not require the sanction of a by-law confirmed by the shareholders. This was on the ground that the services rendered were in a subordinate capacity and were not rendered in the government of the company.

The by-law may provide that the remuneration to be received shall be such as may from time to time be determined by the board; the actual amount need not be fixed by the by-law: *Mackenzie* v. *Maple Mountain &c. Co.* (1910) 20 O. L. R. 615, 620. The individual

consent of shareholders is not equivalent to the confirmation of a by-law at a general meeting; and in *Bartlett* v. *Bartlett Mines* (1911) 24 O. L. R. 419, it was held the signature of all but one of the shareholders to the minutes was not a compliance with the statute. Sect. 82.

Liability of Directors and Officers.

82. If the directors of the company declare and pay any dividend when the company is insolvent, or any dividend, the payment of which renders the company insolvent, or impairs the capital thereof, they shall be jointly and severally liable, as well to the company as to the individual shareholders and creditors thereof, for all the debts of the company then existing, and for all debts thereafter contracted during their continuance in office, respectively: Provided that, if any director present when such dividend is declared does forthwith, or if any director then absent does, within twenty-four hours after he becomes aware of such declaration and is able so to do, enter on the minutes of the board of directors his protest against the same, and within eight days thereafter publishes such protest in at least one newspaper published at the place in which the head office or chief place of business of the company is situated, or, if no newspaper is there published, in the newspaper published in the place nearest thereto, such director may thereby, and not otherwise, exonerate himself from such liability. 2 E. VII., c. 15, s. 69.

Declaring and paying dividend when company is insolvent.

Exoneration from liability.

See the notes to ss. 70, 71 and 80 of the Act, and s. 123 of the Winding-up Act.

In order to succeed in a claim against the directors under this section a dividend must have been actually declared. Where the defendants have paid most of the available assets of the company to themselves, that is not enough: *Snow* v. *Benson* (1908) 2 W. L. R. 359, a case decided under s. 65 of C. O. (1898) N. W. T. c. 61, corresponding to this section.

The claim for which a creditor is entitled to make the directors liable under this section must be one of debt, and not of damages; nor is a judgment in respect of a claim for damages recovered after the date of the declaration of the alleged dividend within the section: *Snow* v. *Benson*, *supra*.

Debts then existing.

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Liability of directors for transfer of shares to insolvent.

Exoneration from liability.

83. Whenever any transfer of shares not fully paid in has been made with the consent of the directors to a person who is not apparently of sufficient means to fully pay up such shares, the directors shall be jointly and severally liable to the creditors of the company, in the same manner and to the same extent as the transferring shareholder, but for such transfer, would have been: Provided that if any director present when any such transfer is allowed does forthwith, or if any director then absent does, within twenty-four hours after he becomes aware of such transfer and is able so to do, enter on the minute book of the board of directors his protest against the same, and within eight days thereafter publishes such protest in at least one newspaper published at the place in which the head office or chief place of business of the company is situated, or if there is no newspaper there published, then in the newspaper published nearest to such place, such director may thereby, and not otherwise, exonerate himself from such liability. 2 E. VII., c. 15, s. 52.

The directors are not entitled to approve of a transfer of shares not fully paid to a person about whose financial responsibility they have no knowledge. There must be a positive appearance of sufficient means to relieve the directors of liability: *Re Ontario Fire Insurance Co.* (1915) 23 D. L. R. 758. As to what constitutes a proper examination on the part of directors into the solvency of proposed transferees, see the observations of Boyd, C., in *Re Peterborough Cold Storage Co.* (1907) 14 O. L. R. 475.

Where the liability under the section is sought to be enforced by a liquidator the burden of proof is upon him to show that transfers of unpaid stock were made without due information and enquiry as to the solvency of the transferees; *Re Ontario Fire Insurance Co., supra.*

Loan by company to shareholders.

84. If any loan is made by the company to any shareholder in violation of the provisions of this Part, all directors and other officers of the company making the same, or in anywise assenting thereto, shall be jointly and severally liable for the amount of such loan, with interest to the company, and also to the creditors of the company for all debts of the company then existing, or contracted between the time of the making of such loan and that of the repayment thereof. 2 E. VII., c. 15. s. 70.

Compare s. 29 (2), and see *Henderson* v. *Strang* (1919) 43 O. L. R. 617; (1919) 45 O. L. R. 215; under appeal to Supreme Court of Canada. Sect. 85.

85. The directors of the company shall be jointly and severally liable to the clerks, labourers, servants and apprentices thereof, for all debts not exceeding six months' wages due for service performed for the company whilst they are such directors respectively; but no director shall be liable to an action therefor, unless the company is sued therefor within one year after the debt becomes due, nor unless such director is sued therefor within one year from the time when he ceased to be such director, nor unless an execution against the company in respect of such debt is returned unsatisfied in whole or in part. Liability of directors for wages unsatisfied. Limitation as to time.

2. The amount unsatisfied on such execution shall be the amount recoverable with costs from the directors. 2 E. VII., c. 15, s. 71.

The object of the section is to give employees of the classes named a guarantee against the loss of their wages in case of the insolvency of the company by making the directors sureties for payment by it: *Welch* v. *Ellis* (1895) 22 A. R. 255, 262; *Guenard* v. *Coe* (1914) 17 D. L. R. 47; 7 A. L. R. 245. There are varying dicta as to whether the section is remedial or penal. See *Darrah* v. *Wright* (1914-5) 7 O. W. N. 233; *Pilote* v. *Leclerc* (1917) Que. 52 S. C. 127, where the section was said to be penal and therefore to be construed strictly; *Macdonald* v. *Drake* (1906) 16 Man. R. 220; *Dallaire* v. *Leclerc* (1918) 53 Que. S. C. 201, where the opposite view was taken; and *Lee* v. *Friedman* (1910) 20 O. L. R. 49 at p. 56, where Riddell, J. states that it is penal as regards the directors but highly remedial as regards employees. Object of section.

Labourers of all kinds, engineers, foremen, shipping and office clerks, and others of that class are within the section: *Fee* v. *Turner* (1904) 13 Que. K. B. 435, per Hall, J., at p. 447; *Welch* v. *Ellis* (1895) 22 A. R. 255, where Maclennan, J.A., considered that only the humblest class of wage earners was covered, was a decision on the corresponding section of the Ontario Companies Act, which omitted the word "clerk." There a contractor's foreman, who hired and dis- Who are entitled to benefit of section.

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missed men, received and disbursed money for wages, and who did no manual labour, was held not to be a labourer, servant or apprentice. See also *Herman* v. *Wilson* (1901) 32 O. R. 60, where a manager of a mining company, and *Ryan* v. *Wills* (1919) 43 O. L. R. 624 (App. Div.), where a motion picture actress was held not to be within the Ontario section.

The following are cases decided under the section:

Labourer.

This includes a person actually performing manual work at a daily wage, although he is also entrusted with the supervision of other workmen, and to that extent is a boss or foreman: *Fee* v. *Turner* (1904) Que. 13 K. B. 435; also a miner paid at the rate of so much a car, but otherwise working as a daily labourer, being under the direction of a pit-boss: *Crew* v. *Dallas* (1908-9) 9 W. L. R. 598.

Clerk.

The term " clerk " includes a book-keeper working under instruction from a general manager, but not an auditor working under a contract, much, if not all, of whose work could be done by his employers: *Yellowhead Pass, etc. Co.* (1917) 2 W. W. R. 295. The cases under section 70 of the Winding-up Act, *infra,* are also in point as to the meaning of the term clerk. These are collected in *Re Parkin Elevator Co., Ltd., Dunsmoor's Claim* (1916) 37 O. L. R. 277, at pages 287 to 290.

Servant.

This has been held to include a mine superintendent with a restricted authority, and a mine physician, who looked solely to his remuneration from the company for his livelihood and was under the obligation to attend anyone connected with the company when occasion arose: *Yellowhead Pass, etc. Co.* (1917) 2 W. W. R. 295.

See also as to the meaning of labourers, servants, and apprentices the following cases: *Riley* v. *Warden* (1848) 2 Ex. 59; *Sleeman* v. *Barrett* (1864) 2 H. & C. 934; *Hunt* v. *Great Northern Ry. Co.* [1891] 1 Q. B. 601; *Nowlan* v. *Ablett* (1835) 2 C. M. & R. 54; *Nicoll* v. *Greaves,* 33 L. J. C. P. 259; *Lawlor* v. *Linden* (1876) Ir. R. 10 C. L. 188.

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Assignee of claim.

The assignee, legal or equitable, of a wage claim can sue under the section: *Lee* v. *Friedman* (1910) 20 O. L. R. 49.

Claim must be for wages.

The plaintiff's claim must be for wages. Expending money for the company at its request in payment of wages and other services does not create a debt for wages within the section: *Herman* v. *Wilson* (1901) 32 O. R. 60. See also *George* v. *Strong* (1909-10) 1 O. W. N. 350.

Travelling expenses.

An allowance for travelling expenses is within the section: *Pukulski* v. *Jardine* (1912) 26 O. L. R. 323; 5 D. L. R. 242, a decision of the Divisional Court.

In *Darrah* v. *Wright* (1915) 7 O. W. N. 233, Lennox, J., disallowed travelling expenses.

Illustrations.

More or less complicated arrangements are sometime made by companies with their employees and boarding-house keepers and store-keepers, under which it may be difficult to say whether the latter are entitled to sue as assignees of wage claims, or whether the amounts claimed are due not as wages but under the plaintiff's contract with the company.

The plaintiff, a store-keeper, supplied goods to the company's employees, which by verbal arrangement with the company were to be paid for out of their wages. The plaintiff at the end of each month was to, and did, give the company particulars of his account against the men, and the company was to hold back the amount of the account for the plaintiff out of the men's wages. The plaintiff did not discharge the liability of the men until the money had been actually paid by the company. It was held that this was a good equitable assignment of the wages, and the company having paid neither the plaintiff nor the wage-earners, the plaintiff as assignee was held entitled to recover the amount of his claim against the directors: *Lee* v. *Friedman* (1910) 20 O. L. R. 49. On the other hand, where there was an arrangement between a boarding-house keeper and the company whereby the former charged for meals served to the company's employees, the company deducting the amount owing for

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meals from the employees' pay cheques and paying it to the boarding-house keeper, it was held that such amount never became due to the employees at all as wages, but was due to the plaintiff under his contract with the company, and that therefore the plaintiff could not claim as an equitable assignee of the wages: *Olson* v. *Machin* (1912) 8 D. L. R. 188; 4 O. W. N. 287 It was further held in the same case that an action being brought on a note given in part settlement of an account stated made up partly of wages and partly of goods supplied without apportionment as between wages and the other claims, the character of the claim was changed.

Under an arrangement between the plaintiff, a store-keeper, and the company, employees of the company were entitled to have their purchases charged against their wages. The purchasers were required to initial the vouchers, which were sent to the company; and when pay cheques were drawn, a separate cheque was made out for the amount of each workman's store-bill, payable to the workman. These were endorsed by the men and kept by the company, which made an adjustment monthly with the plaintiff, giving him credit for the amounts of the cheques and any goods sold to the company, debiting him with amounts due by him to the company, and giving him a cheque for the net balance. It was held in respect of a claim by the plaintiff based on cheques for balances due him that the money became payable to him by virtue of his direct contract with the company, when an adjustment took place and he accepted a cheque. There was then a novation, the plaintiff became a creditor in respect of the cheques given him, and the demands ceased to be demands for wages: *Coveney* v. *Glendenning* (1915) 33 O. L. R. 571; 22 D. L. R. 461.

Enforcement of liability.

The judgment against the company being *res inter alios acta* is not conclusive against the directors, who may set up such defences as, *e.g.*, that the plaintiff is not a clerk, labourer, etc., *Guenard* v. *Coe* (1914) 17

D. L. R. 47; 7 A. L. R. 245; *Darrah* v. *Wright* (1915) 7 O. W. N. 233. But a mere irregularity in the judgment against the company cannot be attacked by the directors in absence of fraud: *Lee* v. *Friedman* (1910) 20 O. L. R. 49. Sect. 85.

Since the liability of the directors is several as well as joint, the plaintiff is entitled to sue the directors separately as well as jointly, and is not bound to join them all as defendants: *Reuckwald* v. *Murphy* (1914) 28 D. L. R. 474; 32 O. L. R. 133.

Where a number of plaintiffs were suing in one action against the directors, they were required to elect whether one of them, and if so which would proceed with the action: *Herbert* v. *Evans* (1909) 13 O. W. N. 632, 682. Several plaintiffs.

The plaintiff will not be prejudiced by the fact that in his suit against the company he has included a claim on a note as well as one for wages: *Williams* v. *Graham* (1916) 34 W. L. R. 855. Other claims.

It is sufficient compliance with this section that the execution is placed in the hands of the sheriff of the county in which the Head Office of the company is situated: *Pukulski* v. *Jardine* (1912) 26 O. L. R. 323; 5 D. L. R. 242. It is enough to satisfy the statute that a fair and *bona fide* attempt has been made to collect the amount of the judgment from the company, and that a *bona fide* return has been made that there are no assets of the company to satisfy it: *Price* v. *Munro* (1885-6) 12 A. R. 453, at p. 464, 468. Execution unsatisfied.

A creditor cannot issue execution against a company in liquidation without leave, and if he does so the execution is a nullity: *Pilote* v. *Leclerc* (1917) 52 Que. S. C. 127. Effect of winding-up.

In the event of a winding-up supervening a plaintiff should apply for leave to sue the company and issue execution as a preliminary step to suing the directors: *Re Lake Winnipeg Transportation Co., Paulson's Claim* (1891) 7 Man. R. 602. If the execution is

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already in the sheriff's hands, s. 22 of the Winding-up Act does not prevent the making of a return of *nulla bona* after the winding-up order: *Pukulski* v. *Jardine* (1912) 26 O. L. R. 323; 5 D. L. R. 242.

A workman is not entitled to his remedy against the directors under the section when, having obtained judgment before the winding-up, he neglects to execute it before the company goes into liquidation and fails to get leave to issue execution afterwards: *Pilote* v. *Leclerc* (1917) 52 Que S. C. 127. On the other hand the Quebec Superior Court recently held in *Dallaire* v. *Leclerc* (1918) 52 Que. S. C. 201, that the plaintiff need not show a return of *nulla bona* if the company's inability to satisfy the claim appeared from the fact that it had gone into liquidation and that there had been a sale by the liquidator. It was further held that a delay of nine days by the plaintiff was not negligence on his part, which the directors could set up as sufficient ground for a non-suit unless they were prejudiced thereby. It was held that the winding-up did not put an end to the directors' powers, but only suspended their exercise, so that the directors did not cease to be such on the occurrence of the liquidation.

De facto directors.

De facto directors are liable under the section: *Macdonald* v. *Drake* (1906) 16 Man. R. 220.

Liability of directors for premature commencement of business.

86. Every director of any company who expressly or impliedly authorizes the commencement of operations by the company or the incurring of any liabilities by the company before ten per centum of its authorized capital has been subscribed and paid for, shall be jointly and severally liable with the company for the payment of any such liabilities so incurred. 2 E. VII., c. 15, s. 18.

Cf. section 26, and see *Muldowan* v. *German Canadian Land Co.* (1909) 19 Man. L. R. 667, 674; *French Gas Saving Co.* v. *Desbarats* (1912), 1 D. L. R. 136.

Meetings. Secs. 87-88.

87. Shareholders who hold one-fourth part in value of the subscribed stock of the company may at any time by written requisition and notice call a special meeting of the company for the transaction of any business specified therein. 2 E. VII., c. 15, s. 72. Special meeting.

88. In the absence of other provisions in that behalf in the letters patent or by-laws of the company,— Provisions as to.

(a) notice of the time and place for holding a general meeting of the company shall be given at least fourteen days previously to the time in such notice specified for such meeting, in some newspaper published in the place where the head office or chief place of business of the company is situate, or if there is no such newspaper, then in the place nearest thereto in which a newspaper is published; Notice.

(b) at all general meetings of the company, every shareholder shall be entitled to give one vote for each share then held by him; and such votes may be given in person or by proxy, if such proxy is himself a shareholder: Provided that no shareholder shall be entitled either in person or by proxy, to vote at any meeting unless he has paid all the calls then payable upon all the shares held by him; Votes. Proxies. Calls to be paid.

(c) all questions proposed for the consideration of the shareholders at such meetings shall be determined by the majority of votes, and the chairman presiding at such meetings shall have the casting vote in case of an equality of votes. 2 E. VII., c. 15, s. 73. Majority vote. Casting vote.

Special Meeting.
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Meetings.
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Secs. 87-88. Special Meeting.

The shareholders of one-fourth part in value of the subscribed capital were held competent under the Dominion Companies Act to convene a special meeting for the election of directors, where no annual general meeting had been held, or where, if held, no election had taken place: *Austin Mining Co.* v. *Gemmell* (1886) 10 O. R. 703; and see *Sovereen* v. *Whiteside* (1906) 12 O. L. R. 638.

The one-fourth part in value is reckoned on the par value subscribed, not the amount paid: *Purdom* v. *Ontario Loan, &c., Co.* (1892) 22 O. R. 597.

The right of a bearer of a share warrant to sign a requisition for a special meeting will depend on the regulations of the company respecting share warrants (s. 68 A 4) and whether he is deemed to be a shareholder thereunder. Joint holders of shares must all sign, unless the by-laws otherwise provide: *Patent Wood Keg Syndicate* v. *Pearse* (1906) W. N. 164.

Where the directors, or failing them the shareholders, have power to call a general meeting the Court will not interfere to compel the directors to summon a meeting: *Macdougall* v. *Gardiner* (1875) L. R. 10 Ch. App. 606.

Notice.

As the section is silent as to the contents of the notice presumably the general rule applies that where there are no special provisions the notice should state the date, time and place of the meeting and the nature of the business to be considered; cf. *Reg.* v. *Hill* (1825) 4 B. & C. 426. See also on contents of notice *Pacific Coast Mines* v. *Arbuthnot* (1917) 36 D. L. R. 564; (1917) A. C. 607.

Meetings.

Meetings generally

The members of a company in a general meeting assembled constitute a forum supreme in all that relates to the internal arrangement provided they keep within the corporate powers and act in subordination

to the immutable statutes, if any, which form its constitution: *Mayor of Colchester* v. *Louten* (1813) 1 V. & B. 226. Secs. 87-88.

The company can only transact its business and manifest its wishes by and through the individuals composing it. This is done at the meetings of the company, general or special, and it is, therefore, necessary that the legal requisites for the validity of such meetings should be strictly observed.

The individual consents of the shareholders given separately are not equivalent to a resolution passed at a meeting: *Re George Newman & Co.* (1895) 1 Ch. 674, at p. 686, except where authorized by statute, *e.g.*, s. 48, which provides that a by-law creating preference shares may be unanimously sanctioned in writing by all the shareholders. Where, however, all the persons beneficially interested in the company's capital have concurred the company or its liquidator may be bound by a transaction notwithstanding the absence of a shareholders' meeting: *A. G. of Canada* v. *Standard Trust* (1911) A. C. 498.

Meetings are of two kinds, ordinary or general and extraordinary or special. The former are held periodically at appointed times and for the consideration of matters in general; the latter are called upon emergencies and for the transaction of special business: *Austin Mining Co.* v. *Gemmell* (1886) 16 O. R. 706.

The provisions as to the annual meeting of a company are set out in s. 105. If the directors for the ensuing year are proposed to be elected at the annual meeting in accordance with the usual practice the meeting is required to be held at some place within Canada, s. 77:

Notice of Meetings.

Every shareholder has a right to be present at a meeting and to be notified that a meeting will take place, and the omission to give notice to any shareholder, even though the omission be accidental, will invalidate the proceedings of the meeting: *R.* v. *Lang-* Notice of meetings.

Secs. 87-88.

horne (1836) 4 A. & E. 538; *Alexander* v. *Simpson* (1889) 43 Ch. D. 139. The directors can not revoke the provisions of the company's by-laws as to notice of meetings of shareholders: *Canada Furniture Co.* v. *Banning* (1918) 39 D. L. R. 313. The executors of a deceased shareholder, who have not themselves become registered as shareholders, in the absence of special provisions in the by-laws are not entitled to notice: *Allen* v. *Gold Reefs* (1900) 1 Ch. 656; nor need a notice be sent directed to the deceased shareholder at his registered address, *ibid.* But see s. 3 (d) of the Act.

Notice of meetings.

The right of a bearer of a share warrant to receive notice of meetings will depend on the provisions and regulations of the company respecting share warrants, s. 68 A.

Shareholders residing abroad will not be entitled to notice in the absence of a contrary provision in the by-laws: *Re Union Hill Silver Co.* (1870) 22 L. T. 200.

But the by-laws of the company may restrict the giving of notice: *Rex* v. *Bird* (1811) 13 East 367.

If all the shareholders are actually present at a meeting, whether with or without notice, the want of notice will be excused unless objection is taken at the time: *Re British Sugar Refining Co.* (1857) 3 K. & J. 408.

Apart from special provisions a notice should state the date, and time and place of meeting, and the nature of the business to be considered: *R.* v. *Hill* (1825) 4 B. & C. 426.

Where notice of a meeting has once been given the directors can not in the absence of special provisions in the articles by a further notice postpone the meeting: *Smith* v. *Paringa Mines* (1906) 2 Ch. 193.

A notice that a meeting will be held at a specified time and place, but dependent upon a certain contingency, is not a good notice: *Alexander* v. *Simpson* (1889) 43 Ch. D. 139.

The failure to specify the business with clearness and accuracy will invalidate the notice and render the

meeting irregular: *Wills* v. *Murray*, 4 Ex. 843; *Re* Secs. 87-88.
Silkstone Colliery Co. (1875) 1 Ch. D. 38; *Kaye* v. *Croyden* (1898) 1 Ch. 358.

Business cannot be transacted at a meeting foreign to the objects specified in the notice, but if it is it will not render the whole meeting irregular: *Re British Sugar Refining Co.* (1857) 3 K. & J. 408.

Relevant and legitimate amendments may be proposed to any resolutions coming within the scope of the notice.

If the notice sets out that a resolution will be considered for increasing the capital, an amendment is allowable, substituting a lesser amount than the one named, but apparently not a greater amount, and certainly not an amount very much in excess of that mentioned. See *Henderson* v. *Bank of Australasia* (1890) 45 Ch. D. 330; *Alexander* v. *Simpson* (1887) 43 Ch. D. 139; *Imperial, etc., Co.* v. *Hampson* (1882) 23 Ch. D. 9; *Wright's Case* (1871) L. R. 12 Eq. 331.

When special notices have been sent to each of the shareholders individually an omission literally to comply with the regulations by also advertising the meeting will not make it defective: *Re British Sugar Refining Co.* (1857) 3 K. & J. 408.

A notice should be read and construed as an ordinary business man would read and construe it: *Alexander* v. *Simpson* (1889) 43 Ch. D. 139.

And where the notice sets out that it is proposed to remove "any" of the directors "all" may be removed: *Isle of Wight R. Co.* v. *Tahourdin* (1883) 25 Ch. D. 332.

Where an Act passed for the purpose of validating an *ultra vires* agreement so provided "subject to the same being adopted by a resolution passed by 75 per cent. of the shareholders present personally or by proxy at any meeting . . . called for that purpose," it was held that a notice of the meeting was bad, which did not put the shareholders in a position in which each of them could have judged for himself whether he would consent to the proposals coming before the meeting: *Pacific Coast Mines, Ltd.* v. *Arbuth-*

Secs. 87-88.

Notice of meetings.

not (1917) 36 D. L. R. 564. It was further held that the conditions of the Act must be literally complied with to render such agreement *intra vires* and such fulfilment could not be inferred from acquiescence. See also the observations of Viscount Haldane at p. 571, as to the necessity for full notice to shareholders who had given proxies at dates prior to the agreement sought to be ratified.

In the absence of provisions as to the length of notice (such as appears, *e.g.*, in s. 88 (a)) reasonable notice is necessary, and two days' notice has been held reasonable.

Where directors of a company are proceeding to call a meeting at an early date to prevent some of the shareholders from exercising their voting power, they will be restrained by the Court: *Cannon* v. *Trask* (1875) L. R. 20 Eq. 669.

By whom given.

By whom given.

Section 80 (e) enables the directors to pass by-laws as to the calling of meetings "regular and special" of the company; and such by-laws generally provide that meetings shall be summoned by the directors. The summoning of meetings should be authorized by resolution of the board; the consent of a quorum of directors as individuals will not suffice: *In re Haycraft Gold Reduction Co.* (1900) 2 Ch. 230, but the directors as a board may before the meeting ratify an unauthorized notice sent out by an official of the company and purporting to have been given under their authority: *Hooper* v. *Kerr Stuart* (1900) 83 L. T. 729. Resolutions passed at a meeting summoned by a board of *de facto* directors are not invalid: *Boschoek, &c., Co.* v. *Fuke* (1906) 1 Ch. 148. As to notices given by unauthorized persons, see *In re Haycraft Gold Reduction Co.* (1900) 2 Ch. 230; *Re State of Wyoming Syndicate* (1901) 2 Ch. 431; *Courchene* v. *Viger Park Co.* (1915) 23 D. L. R. 693; 24 Que. K. B. 97. The correct procedure is for the notice to state that it is given "by order of the board." The company may take advan-

tage of an irregularity as against its secretary-treasurer: *Courchene* v. *Viger Park, supra.* Secs. 87-88.

How given.

In the absence of special provision in the letters patent or by-laws notice of a general meeting must be given by advertisement published in compliance with s. 88 (a). "At least fourteen days" in this section means fourteen clear days: *Reg.* v. *Justices of Shropshire,* 8 Ad. & E. 173; cf. also *In re Railway Sleepers, &c. Co.* (1885) 29 Ch. D. 204.. How given.

The directors are authorized by s. 80 (e) to pass by-laws as to the calling of meetings and the words "in the absence of other provisions in that behalf in the . . . by-laws for the company," appearing in s. 88 by implication permit the by-laws to provide that notice may be given otherwise than by advertisement. The common form of by-law governing the giving of notice of meeting provides for the mailing of notices to the shareholders. *Quære,* whether in view of s. 97 a notice mailed in an unregistered letter is validly served. A notice served by post is to be deemed to have been served when the letter containing it would be delivered in the ordinary course of post, s. 98. Accordingly, when notice is given by post it is necessary to allow a sufficient margin of time for the delivery of the letter in computing the interval between the date of service and the date of the meeting.

Right of discussion.

As to the right of a shareholder to speak at a meeting, see *Wall* v. *London & Northern Assets Corporation* (1898) 14 T. L. R. 496; 2 Ch. 469. Right of discussion.

A speech by a shareholder at a meeting of the company defamatory of the directors is privileged where it is in reference to matters which affect the company's interests: *Parsons* v. *Surgey* (1864) 4 F. & F. 247. And a circular signed by a shareholder to the other shareholders of the company is also privileged though it contains libellous matter: *Quartz Hill Gold Mining*

Secs. 87-88.

Co. v. *Beall* (1882) 30 W. R. 583. See also *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.* (1869) L. R. 4 Q. B. 262; *Liverpool Household Stores* v. *Smith* (1887) 37 Ch. D. 170; *Pittard* v. *Oliver* (1891) 39 W. R. 311. And see *Harper* v. *Hamilton Retail Grocers' Association* (1900) 32 O. R. 295.

A report to a newspaper of the proceedings of a general meeting is not, however, privileged: *Davison* v. *Duncan* (1857) 7 E. & B. 229.

And see generally, *Owen Sound Building and Savings Society* v. *Meir* (1893) 24 O. R. 109; *Toronto Brewing and Malting Co.* v. *Blake* (1882) 2 O. R. 175; *Austin Mining Co.* v. *Gemmell* (1886) 10 O. R. 696; *Christopher* v. *Noxon* (1886) 4 O. R. 672.

Minority rights.

Minority rights.

At any meeting the majority, in the absence of express provision to the contrary, will bind the minority: *Re Horbury Bridge Coal Co.* (1879) 11 Ch. D. 109. It is sometimes said that the majority is the company, but this is not accurate.

As to the rights of minorities the following rules have been formulated by Buckley (Companies Acts, 9th ed., pp. 612-14) :—

Rules as to.

"1. If an act, not *ultra vires* the corporation, and which therefore might be done with the approval of a majority, be done irregularly and without such approval, then the majority are the only persons who can complain, and the Court will not entertain the complaint except at the instance of the majority, and in a proceeding in which the corporation is plaintiff.

2. In any proceeding brought to redress a wrong done to the corporation, or to recover property of the corporation, or to enforce rights of the corporation, the corporation is the only proper plaintiff.

Except that if (see rule 3, *infra*) an individual corporator sues the corporation to prevent it from doing something *ultra vires, e.g.,* to restrain it from carrying out an agreement with a third party, and joins that third party as a defendant, then as a necessary inci-

dent to the first part of the relief claimed, the Court will go on to direct the repayment of money, or restoration of property paid or disposed of under the agreement. Secs. 87-88.

3. A single shareholder suing on behalf of himself and others, or suing alone and not on behalf, may make the company a defendant, and may restrain the company and directors from doing an act which is illegal or criminal, or *ultra vires* the corporation, and which a majority are consequently unable to affirm. A stranger who is not specially damaged cannot sue, and neither, *semble*, can a shareholder, who has with knowledge received and retains part of the proceeds of the *ultra vires* acts.

If, however, a majority are opposed to the illegal act, *quære* whether the company should not be made or at any rate joined as plaintiff.

4. If the act complained of be not *ultra vires*, but be a wrong done to the corporation, of which therefore the corporation alone, upon the principles already stated, can complain, yet if the alleged wrongdoers be themselves the majority, or turn the scale of the majority, then the minority may sue by one shareholder on behalf of himself and others.

5. The above are general rules strictly adhered to, but not inflexible, and any case where the claims of justice require that an action in which the company is not plaintiff should be entertained, may be made an exception. But if the case is one in which the company ought to sue, then (subject to rule 6) the shareholder must exhaust all reasonable means of obtaining the institution of an action by the company before suing himself. But if the case be one of class (4), it is idle to say that a meeting ought to be called in which the alleged wrongdoers should not vote, for that would be trying the question of fraud as a preliminary step for ascertaining the frame of the action in which it is to be tried.

6. If the case be one in which the company ought to be plaintiff, the fact that the seal is in the possession of

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Minority rights.

the adverse party will not necessarily preclude the intending plaintiffs from using the company's name. Neither will it be necessary to obtain the resolution of a general meeting in favor of the action before the writ is issued. In many cases the delay might amount to a denial of justice. In a case of urgency, the intending plaintiffs may use the company's name, but at their peril, and subject to their being able to show that they have the support of the majority. In an action so constituted, the Court may give interlocutory relief, taking care that a meeting be called at the earliest possible date to determine whether the action really has the support of the majority or not. If it appears that the company's name has been used improperly, it will be struck out, and either the solicitor who used it or the person who in fact instructed the solicitor, will be ordered to pay the company's costs as between solicitor and client and the defendant's costs as between party and party.

7. A single shareholder may sue the company to enforce any individual right of his own, *e.g.*, his right to have his vote recorded, or his right as a director to restrain his co-directors from excluding him from the board."

Decisions.

Decisions.

A majority cannot divert corporate funds to purposes other than those for which they were advanced: *Bagshaw* v. *Eastern Union R. Co.* (1849) 7 Hare 114; nor validate an *ultra vires* contract: *Ernest* v. *Nichols* (1851) 6 H. L. C. 401.

In all matters of purely internal management the majority is supreme: *Foss* v. *Harbottle* (1843) 2 Hare 461; so long as the majority act with *bona fides* and due consideration for the opinions of dissentients: *Foss* v. *Harbottle* (1843) 2 Hare 461. See also *Burland* v. *Earle* (1902) A. C. 83; *Brown* v. *Menzies Bay Timber Co.* (1917) 34 D. L. R. 452; *Johnston* v. *Thompson* (1914) 15 D. L. R. 546; *Ross* v. *B. C. Refining Co.*,

16 B. C. R. 227; *Wheeler* v. *Freame* (1914) 7 W. W. R. 191. Secs. 87-88.

This rule means that if the act done, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act cannot be sustained because a general meeting of the company might immediately confirm and give validation to the act which the bill instances: *Bagshaw* v. *Eastern Union R. Co.* (1849) 7 Hare 114; *Purdom* v. *Ontario Loan Co.* (1892) 22 O. R. 597.

The majority may modify the nature of the business carried on as long as they do not engage in anything *ultra vires*: *Attorney-General* v. *Gould* (1860) 28 Beav. 485; *Grant* v. *United Kingdom Switchback R. Co.* (1888) 40 Ch. D. 135.

When quarrels arise and the governing body are so divided that they cannot act together, the Court will interfere: *Featherstone* v. *Cooke* (1873) L. R. 16 Eq. 298.

The minority may invoke the aid of the Court when they suffer a special detriment by the directors taking the profits or using the assets for their own ends: *Hodgkinson* v. *National Live Stock Ins. Co.* (1859) 4 De G. & J. 422; *Hichens* v. *Congreve* (1828) 4 Russ. 562.

So where a fraud has been committed on a corporation by the majority: *Atwood* v. *Merryweather* (1868) L. R. 5 Eq. 464; *Heath* v. *Erie R. Co.*, 8 Blatch. 347. Or, where there is improper, inequitable, or harsh conduct towards the minority: *Waddell* v. *Ontario Canning Co.* (1889) 18 O. R. 41; *Re London & Merc. Discount Co.* (1865) L. R. 1 Eq. 277; *Fraser* v. *Whalley* (1864) 2 H. & M. 10.

They may also ask relief where meetings have not been held at convenient times: *Cannon* v. *Trask* (1875) L. R. 20 Eq. 669. And they are entitled to a fair hearing at the meetings of the company: *Const.* v. *Harris*, Turn & R. 496.

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Minority rights.

Decisions.

A leading English case is that of *Menier* v. *Hooper's Telegraph Works* (1874) L. R. 9 Ch. 350. There the majority of the shares were owned by another company, and Mellish, L.J., said that the majority could not be allowed to sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration that might come to them. And the majority, *i.e.*, the rival company, will be restrained from controlling the management of the corporation so as to advance their own profits by lessening those of the other company: *Memphis & Charleston R. Co.* v. *Woods,* 16 Am. St. 81.

The majority will also be restrained from paying dividends on common stock in derogation of the rights of preference stockholders: *Henry* v. *Great Northern R. Co.* (1857) 4 K. & J. 1; *Bannatyne* v. *Direct Spanish Telegraph Co.* (1887) 34 Ch. D. 287; *Sturge* v. *Eastern Union R. Co.* (1855) 7 D. M. & G. 158. And similarly when special rights are given to ordinary shareholders as to division or appropriation of profits: *Fawcett* v. *Laurie* (1860) 1 Dr. & Sm. 192; but see *Johnston* v. *Consumers' Gas Co.* (1895) 27 O. R. 9. And the majority cannot agree to levy calls otherwise than on every shareholder alike: *Preston* v. *Grand Collier Dock Co.* (1840) 11 Sim. 326.

Where a municipal corporation passed a by-law to raise money for a specific purpose they were restrained at the suit of a taxpayer for diverting the money to another purpose: *Brogdin* v. *Bank of Upper Canada* (1867) 13 Gr. 544; *Grier* v. *Plunkett* (1868) 15 Gr. 152.

A shareholder cannot maintain an action on behalf of himself and all other shareholders to recover property, whether from the directors or officers, or any other person: *Gray* v. *Lewis* (1873) L. R. 8 Ch. 1050; *Mozley* v. *Alston* (1847) 1 Ph. 790; *Foss* v. *Harbottle* (1843) 2 Hare 461. But one or more shareholders may sue in their own name in the class of cases referred to above. The majority may determine whether the charter shall be surrendered. But see *Ward* v. *Society of Attorneys* (1844) 1 Coll. 370.

A majority may also apply for an Act of Parliament to change or modify the nature of the company, but the use of the company's money for this purpose may be restrained. See *Ward* v. *Society of Attorneys, supra; Ware* v. *Grand Junction Waterworks Co.* (1831) 2 R. & M. 470; *Steele* v. *N. Metropolitan R. Co.* (1867) L. R. 2 Ch. 237; *Telford* v. *Metrop. Board of Works* (1872) L. R. 13 Eq. 574; *Munt* v. *The Shrewsbury & Chester R. Co.* (1850) 13 Beav. 1; *Simpson* v. *Denison* (1852) 10 Hare 51. Secs. 87-88.

While a director is precluded from entering into engagements in which he has a personal interest conflicting with that of the company, a contract so entered into may be adopted by the company, provided that its adoption is not brought about by unfair or improper means, and is not illegal or fraudulent, or oppressive, towards those shareholders who oppose it: *North-West Transportation Co.* v. *Beatty* (1887) 12 App. Cas. 589, and in such a case a director has a perfect right to acquire sufficient shares to give him a majority, and to exercise his voting power in such a manner as to secure election of directors who will support the transaction and ratify the proceeding at a shareholders' meeting. *Ibid.* and see *Christopher* v. *Noxon* (1884) 4 O. R. 672. Decisions.

But where directors had made a misapplication of the funds to their own purposes, it was held that they could not subsequently validate it by a directors' by-law, ratified at a shareholders' meeting, at which they controlled the majority of votes: *Waddell* v. *Ontario Canning Co.* (1889) 18 O. R. 41. And in this case the circumstances were considered ample by Robertson, J., to bring it within the rule as to harsh treatment.

And see *Purdom* v. *Ontario Loan Co.* (1892) 22 O. R. 597, for a discussion of the general rule that the Court does not interfere with the doing of an act by a company which should have been sanctioned by a majority of the shareholders before the act was done, if

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such sanction can be afterwards obtained. See also *Re Bolt & Iron Co.* (1887) 14 O. R. 211.

It should also be remembered that a mercantile company in the absence of express power cannot transfer the whole of its business and assets, so as to render itself incapable in future of performing any of its corporate functions, without the consent of every shareholder, and an injunction will be granted on the application of a shareholder to restrain such a proposed sale: *Beaston* v. *Farmer's Bank* (decision of Story, J.), 12 Peters 102; *Era Life and Fire Ins. Co.* (1863) 1 DeG. J. & S. 29, 2 J. & H. 404, 1 H. & M. 672; *Bird* v. *Bird's Patent, etc., Co.* (1874) L. R. 9 Ch. 358. But the transfer may in such a case practically be made effectual by means of a winding-up. See further on this point notes to 32, *supra.*

As to actions by shareholders see also notes to s. 99.

Chairman.

Chairman.

The duty of the chairman is to keep order and see that the business is properly conducted: *Indian Zoedone Co.* (1884) 26 Ch. D. 70.

He has *prima facie* authority to decide all incidental questions which arise at such meeting, and necessarily require decision at the time, and the entry by him in the minute book of the record of a poll and of his decision on all such questions although not conclusive is *prima facie* correct. *Ibid.*

The chairman should see that the meeting is promptly called to order, but see *Armstrong* v. *McGibbon* (1906) Q. R. 15 K. B. 345.

While the chairman may adjourn with the consent of the meeting, etc., he may, in his discretion, refuse to adjourn the meeting: *Salisbury Gold Mining Co.* v. *Hathorn* [1897] A. C. 268.

If the chairman wrongfully adjourns the meeting, the shareholders may select a new chairman and proceed with the business of the meeting: *National Dwellings Society* v. *Sykes* [1894] 3 Ch. 159. But if a meeting is properly adjourned members who remain

behind cannot validly proceed with the business of the meeting: *R.* v. *Gaborian* (1809) 11 East 77. Secs. 87-88.

Official notice need not be given of a regularly adjourned meeting: *Wills* v. *Murray* (1850) 4 Ex. 843; *Scadding* v. *Lorant* (1851) 3 H. L. C. 418.

The business which may come before the adjourned meeting is limited to the business which could have come before the original meeting: *Christopher* v. *Noxon* (1884) 4 O. R. 672

As to the conclusiveness of the chairman's declaration of the result of a vote see *In re Hadleigh Castle Gold Mines* (1900) 2 Ch. 419; *Arnot* v. *United African Lands, Ltd.* (1901) 1 Ch. 518; *Caratel (New) Mines, Ltd.* (1902) 2 Ch. 498.

Votes.

Unless there is some provision to the contrary to be found in the charter or other instruments by which the company is incorporated, the resolution of the majority of the shareholders duly convened on any question with which the company is legally competent to deal is binding upon the minority, and consequently upon the company: *North-West Transportation Co.* v. *Beatty* (1887) 12 App. Cas. 589. But there are cases such as the alienation of corporate property where the dissent of one shareholder may frustrate the wishes of the majority: *Wilson* v. *Miers* (1861) 10 C. B. N. S. 348.

But a majority of the members will not be allowed by vote to commit a fraud on the minority: *Menier* v. *Telegraph Co.* (1874) L. R. 9 Ch. 350.

The register is the only evidence by which the right of members to vote at a general meeting can be ascertained. The question of beneficial ownership cannot be entered into: *Pender* v. *Lushington* (1877) 6 Ch. D. 70.

An action lies to compel the directors to record a vote where the shareholder is improperly deprived of his right. *Ibid.*

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There is nothing to prevent a shareholder from transferring some of his shares to nominees to increase his voting power: *Re Stranton Iron and Steel Co.* (1873) L. R. 16 Eq. 559.

Votes.

A shareholder's vote is a right of property, and he may use it as he pleases, whether his motive be proper or improper: *Pender* v. *Lushington, supra.*

Thus, where a director who held half the shares in a company made a contract to sell a ship of his own to the company and cast his own votes in favour of the contract, it was held that the contract, though voidable, had been adopted, and was binding on the company: *North-West Transportation Co.* v. *Beatty* (1887) 12 App. Cas. 589. And see also *East Pant Mining Co.* v. *Merryweather* (1864) 2 H. & M. 261.

See as to minority rights, notes *supra.*

Executors, etc.

An executor, administrator, curator, guardian or trustee may vote in respect of any shares held in such capacity; and a pledgor may vote in respect of the shares pledged, s. 42. Joint holders must concur in voting, unless the by-laws provide otherwise, as, *e.g.* the common form which is to the effect that the person first named in the register shall exercise the voting power.

Joint holders.

Joint holders of shares by virtue of their property therein are entitled to have their shares so entered on the register, *e.g.,* in the reverse order as to part of the shares, so as to enable them to exercise their voting power in the event of one of them being unable to be present in person at such meetings: *Burns* v. *Siemens Bros. Lim.* (No. 2) (1919) 88 L. J. Ch. 21.

Proxy.

Proxy.

There is no common law right to vote by proxy: *Harben* v. *Phillips* (1883) 2 Ch. D. 32; *Howard* v. *Hill* (1889) 37 W. R. 219. Such right is, however, conferred by s. 88 (b) in the absence of a contrary provision in the latters patent or by-laws. Under the act, by s. 80 (c) the directors are given the power to pass by-laws with reference to the requirements as to proxies,

and the shareholders have no right to initiate such by-laws: *Kelly* v. *Electrical Construction Co.* (1908) 16 O. L. R. 232. Secs. 87-88.

If one corporation holds shares in another it may exercise its vote by proxy: *Re Indian Zoedone Co.* (1884) 26 Ch. D. 70. The chairman's decision as to the validity of proxies is binding on the shareholders, *ibid.*

A proxy may be signed and delivered in blank if subsequently filled up before being used: *Ernest* v. *Loma* (1897) 1 Ch. 1.

In the absence of any by-law imposing regulations nothing more is necessary to a proxy than its valid execution by the shareholder: *Kelly* v. *Electrical Construction Co.* (1908) 16 O. L. R. 232.

The power to regulate the requirements as to proxies under s. 80 (e) will not enable the directors to take away such rights: *Canada National* v. *Hutchings* (1918) 87 L. J. Ch. 106. Under s. 88 (b) it will be sufficient if the proxy becomes a shareholder at any time before he votes: *Bombay* v. *Shroff* (1905) A. C. 213. Where proxies are required to be lodged a certain number of hours before a meeting or adjourned meeting it is not a compliance with the requirements to lodge them the specified number of hours before the poll is taken: *Shaw* v. *Tati Concessions* (1913) 1 Ch. 292.

Directors may at the company's expense send out forms of proxy in which the directors are named accompanied by stamped envelopes for the return of the forms: *Peel* v. *London & N. W. Ry.* (1907) 1 Ch. 5; and may employ the company's officers and funds for the purpose of putting their recommendations before the shareholders; nor is it incumbent on the directors in so doing to put forward also the arguments of the dissentient shareholders: *Campbell* v. *Australian Mutual* (1908) 24 T. L. R. 623.

Poll.

In the first instance the votes of the shareholders present are usually taken by a show of hands without Poll.

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regard to the number of shares or proxies held by the voters, and if a poll is demanded it is to be taken in the manner prescribed by the by-laws.

The right to demand a poll is incident to an election at a public meeting: *Campbell* v. *Maund* (1835) 5 A. & E. 865, and may be demanded by any single member in the absence of provision to the contrary. As to the manner of taking a poll it is usual to require every person who desires to vote to sign a paper headed, as the case may be, " for " or " against " the motion. The shares held by each member are then inserted and these having been added up the chairman declares the result. Scrutineers are appointed and report to the chairman.

The function of the scrutineers is judicial. Where an election of directors is being held, a director who is a candidate is not entitled to act as scrutineer, and if he does the election may be set aside: *Dickson* v. *Murray* (1881) 28 Gr. 533.

The shareholders or their proxies must personally attend and vote. A vote can not be taken by means of polling papers in the absence of statutory or other authority entitling the shareholders to vote in this manner: *McMillan* v. *Le Roi* (1906) 1 Ch. 331. *Quaere* whether a by-law containing such a provision would be valid under the Dominion Act.

The by-laws may provide that a poll shall be taken at a time and place to be fixed by the directors within a certain number of days from the date of the meeting, but in the absence of specific provision, s. 49 (2) of the Ontario Act, and corresponding sections in other Acts, will govern, and the poll may be taken as the chairman may direct. In such a case he may direct the poll to be taken then and there: *Chillington Iron Co.* (1885) 29 Ch. D. 159. See *Re Horbury Bridge* (1879) 11 Ch. D. 114, and *R.* v. *D'Oyly* (1840) 12 A. & E. 139.

The provision that a poll shall be taken if demanded is imperative: *Anthony* v. *Seger* (1789) Hagg. Con. Cas. 9. And the meeting is regarded as continuing until the poll is taken: *R.* v. *Wimbledon* (1882) 8 Q. B. D. 459.

Quorum. Secs. 87-88.

Quorum.

The directors are empowered by s. 80 (e) to pass by-laws fixing the quorum; but the quorum can not be fixed at less than two, for one person will not constitute a meeting: *Sharpe* v. *Dawes* (1876-7) 2 Q. B. D. 26. In the absence of a quorum no business can be transacted: *Howbeach &c., Co.* v. *Teague* (1860) 5 H. & N. 161 and see *Armstrong* v. *McGibbon* (1906) Q. R. 15 K. B. 345.

However the company as against an outsider may be precluded from setting up the irregularity, *e.g.* in the case of bonds in the hands of a *bona fide* holder which are valid on their face but authorized by a resolution invalid for want of a proper quorum.

Where a company has furnished a vendor of property with a copy of a resolution of directors, authorizing the purchase, purporting to be regular, the company cannot afterwards claim that the resolution was passed at a meeting at which there was no quorum present: *Montreal* v. *Robert* (1906) A. C. 196.

As to whether shareholders who are not entitled to vote may assist in forming a quorum, see *Doig* v. *Matthews* (1915) 25 D. L. R. 732 and cases cited: *Doig* v. *Port Edward Townsite Co.* (1916) 22 B. C. R. 418.

Books of the Company.

89. The company shall cause a book or books to be kept by the secretary, or by some other officer specially charged with that duty, wherein shall be kept recorded,— Books shall contain.

(*a*) a copy of the letters patent incorporating the company, and of any supplementary letters patent, and of the preliminary memorandum of agreement and of all by-laws of the company; Charter agreement, by-laws.

(*b*) the names, alphabetically arranged, of all persons who are or have been shareholders; Names of shareholders.

(*c*) the address and calling of every such person, while such shareholder, as far as can be ascertained; Address and calling.

(*d*) the number of shares of stock held by each shareholder; Number of shares.

(*e*) the amounts paid in and remaining unpaid, respectively, on the stock of each shareholder; and, Amounts paid.

Sect. 89.

Names, addresses and calling of directors.

(*f*) the names, addresses and calling of all persons who are or have been directors of the company, with the several dates at which each became or ceased to be such director. 2 E. VII., c. 15, s. 74.

Register of transfers.

90. A book called the register of transfers shall be provided, and in such book shall be entered the particulars of every transfer of shares in the capital of the company. 2 E. VII., c. 15, s. 74.

Books to be open for inspection.

91. Such books shall, during reasonable business hours of every day, except Sundays and holidays, be kept open, at the head office or chief place of business of the company, for the inspection of shareholders and creditors of the company, and their personal representatives, and of any judgment creditor of a shareholder.

Extracts therefrom.

2. Every such shareholder, creditor or personal representative or judgment creditor may make extracts therefrom. 2 E. VII., c. 15, s. 75.

Under the Imperial Act the importance as evidence attached to the share register is greater than under this Act and the English decisions are to be applied with care.

A company will not be allowed to set up its own want of books or improper book-keeping, or neglect to comply with the provisions of the Act: *Re Sprouted Food Co., Hudson's Case* (1905) 6 O. W. R. 514. And a liquidator is at liberty to draw conclusions as to the liability of contributories from books which are defective or do not comply with the Act: *Re Jones & Moore* (1908-9) 18 Man. R. 549.

The books mentioned in ss. 89 and 90 are required by s. 91, to be kept at the company's head office. *Quaere* whether a company is entitled to allow the register of transfers to be kept at the office of a registrar and transfer agent of the company's shares in accordance with the usual practice.

Sections 69-69M. require the company to keep a register of mortgages and keep other documents on file in compliance with those sections.

Minute Books.

Minute books.

There is nothing in the act explicitly requiring minute books to be kept of the proceedings of share-

holders and directors, but in practice this is always done. Sometimes two sets of minute books are kept, one for directors' and one for shareholders' meetings, which is a convenient practice where it is desired to permit shareholders to inspect the minutes of shareholders' meetings. The minutes of meetings of directors are not properly open to the inspection of the shareholders and a provision entitling shareholders to inspect the books wherein the proceedings of the company are recorded has been held not sufficient to entitle them to see the minutes of the proceedings of the directors: *R.* v. *Mariquita* (1858) 1 E. & E. 289. Secs. 89-91.

As minute books are not required to be kept by the act they are not by s. 107 made *prima facie* evidence of the statements therein contained.

See further on evidence the notes to s. 107.

Inspection.

The right to inspection of the company's books conferred by s. 91 is limited to shareholders and creditors only. It has been thought, however, that these terms would include persons proposing to occupy either of these positions, though this seems open to doubt. But a person wishing to contract with a company may generally protect himself by securing the permission of the company to examine the books and in practice little difficulty should arise in this regard. Inspection.

It has been held at common law that the books and papers of a company are the property of its shareholders and they are entitled to inspect them, but it has been further held that there is a duty cast on the shareholders not to disclose "information so acquired" and they may be restrained from doing so: *Ex p. Brinsley* (1866) 36 L. J. Ch. 150. And this rule was held to apply in the case of a shareholder who was also the solicitor for adverse parties engaged in litigation with the company: *R.* v. *Wilts, etc., Navigation Co.* (1874) 29 L. T. 922.

Secs. 89-91.

Books.

At common law the right of a shareholder to inspect the books of the company is only a qualified and limited right. In the absence of statutory provisions, inspection will only be permitted by the court where, and to the extent to which, it is necessary for the purpose of some specific dispute or question pending in which the applicant has a special interest: *The Bank of Bombay* v. *Suleman Sonji* (1908) 24 T. L. R. 698; and of *Rex* v. *Merchant Tailors' Company,* 2 B. & Ald. 115. See also on inspection *Merritt* v. *Copper Crown* (1903-04) 36 N. S. R. 383.

Where the right is unqualified and statutory the motives of the person seeking to enforce it are immaterial and the court has no jurisdiction to enquire into them: *Davies* v. *Gas Light and Coke Co.* (1909) 1 Ch. 708. The right of inspection ceases when the company is in liquidation: *In re Kent Coal Fields Syndicate* (1898) 1 Q. B. 754.

A director in virtue of his office has the right at any time and not at board meetings only to see and take copies of documents belonging to the company: *Burn* v. *London & South Wales Coal Co.* (1890-91) 7 T. L. R. 118. A right of inspection is conferred on the auditor by s. 94B; also on an inspector under s. 92 or s. 93.

The making of false entries in the books required to be kept or refusal or wilful neglect to make any proper entry therein or to permit inspection or taking of extracts is an indictable offence, s. 117, which see. For the penalty imposed on refusal to produce books to an inspector appointed under ss. 92 or 93, see s. 92 (5).

Inspection.

Investigation of affairs of company.

92. (1) The Secretary of State of Canada may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the Secretary of State of Canada may direct,—

(i) In the case of any company have a share capital, on the application of shareholders holding such a proportion of the issued stock of the company as in the

opinion of the Secretary of State of Canada warrants the application;

(ii) In the case of a corporation not having a share capital on the application of such number of the persons on the corporation's register of members as in the opinion of the Secretary of State of Canada warrants the application.

(2) The application shall be supported by such evidence as the Secretary of State of Canada may require for the purpose of showing that the applicants have good reason for and are not actuated by malicious motives in requiring, the investigation; and the Secretary of State of Canada may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

(3) It shall be the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power.

(4) An inspector may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly.

(5) If any officer or agent refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable on summary conviction to a fine not exceeding twenty dollars in respect of each offence.

(6) On the conclusion of the investigation the inspectors shall report their opinion to the Secretary of State of Canada, and a copy of the report shall be forwarded by the Secretary of State of Canada to the company and a further copy shall, at the request of the applicants for the investigation, be delivered to them.

(7) The report shall be written or printed, as may be directed.

(8) All expenses of and incidental to the investigation shall be defrayed by the applicants, unless the Secretary of State of Canada directs the same to be paid by the company, which the Secretary of State of Canada is hereby authorized to do. *Imp. Act, 1908, s. 109.*

Powers of company to appoint inspectors.

93. (1) A company may by resolution at any annual or special general meeting appoint inspectors to investigate its affairs.

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the Secretary of State of Canada, except that, instead of reporting to the Secretary of State of Canada, they shall report in such manner and to such persons as the company by resolution may direct.

(3) Officers and agents of the company shall incur the like penalties in case of refusal to produce any book or document

Secs. 92-94. required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the Secretary of State of Canada. *Imp. Act, 1908, s. 110.*

Report of inspectors to be evidence.

94. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report. *Imp. Act, 1908, s. 111.* 7 & 8 Geo: V. (1917), c. 25, s. 11.

These sections were enacted by 7 & 8 Geo. V. (1917) c. 25 repealing the then existing similarly numbered sections. The inspector is now appointed by the Secretary of State and not by a judge as formerly, and no stated proportion of shareholders or members are required to join in the application, the proportion which will warrant the granting of the application being left to the discretion of the Secretary of State.

The procedure above provided for has been little used in Canada, or in England under the corresponding sections of the Imperial Companies Act (1862) ss. 56-61 and (1908) ss. 109-111.

The object of the section is merely to afford a minority of the shareholders an opportunity of obtaining information which they could not otherwise obtain. The inspector does not occupy a judicial or quasi-judicial position, and when he has made his report his duties are at an end. The report can not be made the foundation of any subsequent proceeding; nor will the report be evidence of the existence of any fact therein stated, or be binding on the company or anyone else, but if duly authenticated it will be admissible in any legal proceeding as evidence of the opinion of the inspector, s. 94; *Re Grosvenor &c. Hotel Co.* (1897) 76 L.T. 337; *Re Town Topics Co., Ltd.* (1911) 20 Man. L.R. 574. It seems unlikely, in the absence of decided cases to the contrary, that the fact that the inspector under s. 92 is now to be appointed by the Secretary of State and that the report is to be made to the latter instead of to a judge will make the foregoing cases cease to be applicable. The Dominion Act contains no provi-

sion corresponding to s. 29 of the Ontario Act R. S. O. (1914) c. 178 for the revocation of letters patent by the Secretary of State, the application of s. 27 of the Dominion Act being limited to forfeiture for non-user. Secs. 92-94.

To justify the making of an order "it should appear that there is reason on substantial grounds to believe that material information regarding the affairs or management of the company is being concealed or withheld from shareholders whose interests entitle them to the disclosure": *Re Town Topics Co. Ltd.* (1911) 20 Man. L. R. 574, per Robson, J., at p. 576. To show mismanagement by the directors is not enough, *ibid.* The fact that no dividends have been declared by a profit making company has been held insufficient to warrant an order under s. 92 as it originally stood: *Re Sarnia Ranching Co.* (1915) 8 W. W. R. 697. The court never interferes to prescribe to a company what it shall do as to its own purely internal affairs: *Lambert* v. *Neuchatel Asphalte Co.* (1882) 30 W. R. 914.

Appointment and remuneration of auditors.

94A. (1) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(2) If an appointment of auditors is not made at an annual general meeting, the Secretary of State of Canada may, on the application of any shareholder of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(3) A director or officer of the company shall not be capable of being appointed auditor of the company.

(4) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a shareholder to the company not less than fourteen days before the annual general meeting; and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to the shareholders, either by advertisement or in any other mode provided by the by-laws of the company not less than seven days before the annual general meeting:

Provided that if, after notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the time required by

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this provision, shall be deemed to have been properly given for the purposes thereof, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this provision, be sent or given at the same time as the notice of the annual general meeting: Provided, however, that a person other than a retiring auditor may be appointed auditor of the company at an annual general meeting as hereinbefore provided, upon a resolution passed by the votes of shareholders present in person or by proxy and holding at least two-thirds of the subscribed stock represented at the meeting.

(5) The first auditors of the company may be appointed by the directors before the first annual general meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the company in general meeting, in which case the company at that meeting may appoint auditors.

(6) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act.

(7) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the first annual general meeting, or to fill any casual vacancy, may be fixed by the directors. *Imp. Act, 1908, s. 112.*

Powers and duties of auditors.

94B. (1) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2) The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state,—

(*a*) whether or not they have obtained all the information and explanations they have required; and

(*b*) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

(3) The balance sheet shall be signed on behalf of the board by two of the directors of the company, and the auditors' report shall be attached to the balance sheet, or there shall be inserted at the foot of the balance sheet a reference to the report, and the report shall be read before the company in general meeting, and shall be open to inspection by any shareholder.

(4) Thereafter any shareholder shall be entitled to be furnished with a copy of the balance sheet and auditors' report at a charge not exceeding ten cents for every hundred words.

(5) If any copy of a balance sheet which has not been signed as required by this section is issued, circulated or published, or if any copy of a balance sheet is issued, circulated, or published without either having a copy of the auditors' report attached thereto or containing such reference to that report as is required by this section, the company, and every director, manager, secretary, or other officer of the company who is knowingly a party to the default, shall on summary conviction, be liable to a fine not exceeding two hundred dollars. *Imp. Act, 1908, s. 113.*

Rights of preference shareholders, etc., as to receipt and inspection of reports, etc.

94c. Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance sheets of a company, and the reports of the auditors and other reports, as is possessed by the holders of ordinary shares in the company. 7-8 Geo. V., 1917, c. 25, s. 11.

The above sections incorporating the provisions of the Imperial Act with respect to auditors, were added to the Act in 1917, and make the appointment of an auditor compulsory. These sections do not apply to corporations organized under s. 7A.

Balance Sheets are dealt with in s. 105, *infra*.

Duties of auditors.

Duties of auditors.

"(i) . . . An auditor is bound to be careful, but not to be suspicious; he is (said Lopes, L.J.) a watch dog, but not a bloodhound;

(ii) . . . It is no part of his duty to take stock (a principle which goes far towards shewing that he is not responsible for taking values generally); and

(iii) . . . Even as regards entries in the books, he is not, in the absence of suspicion, bound to investigate them for the purpose of testing whether the managing director's return of an existing state of facts, (viz., the amount of stock at the moment) is likely to be true, having regard to the stock dealings during the year." Buckley (9th ed.), p. 509.

Decisions.

The auditor is not bound to ascertain whether the business has been conducted on sound principles or not, or whether the directors have been acting within

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their powers: *London and General Bank* (*No.* 2) [1895] 2 Ch. p. 682.

The auditor will ascertain the true financial position of the company by examining its books, and he must take reasonable care to ascertain that the books show the company's true position: *London and General Bank, supra.*

Where the expression "as shown by the books of the company" is introduced into the auditor's certificate, this does not mean a mere verification of the balance sheet by the entries in the books, but it will relieve the auditor from responsibility for matters kept out of the books and concealed from him.

If the auditor has formed the opinion that the assets are over valued he is bound to say so, but it seems that there is no duty to form and express an opinion as to the value of the company's assets: *London and General Bank* (*No.* 2) [1895] 2 Ch. 673.

Having completed his investigation, the duty of the auditor is to give to the members information, and not merely means of information of the result. His duty is to convey information in direct and express terms, not merely to arouse enquiry: *London and General Bank* (No. 2) [1895] 2 Ch. 673, 684, 685, 694. It is true that under some circumstances much commercial injury might be done by publicity in a printed document circulated among a large body of shareholders, and it is possible that if publicity would be very injurious, an auditor would discharge his duty if he made a confidential report to the shareholders and invited their attention to it, and told them where they could see it. But an auditor who gives shareholders means of information instead of information does so at his peril: *London and General Bank* (*No.* 2) [1895] 2 Ch. 673, 684, 685, 694.

If the auditor does not discharge his duty, and, as the natural and immediate consequence of his breach of duty, acts are done, such as the payment of dividends out of capital, which are a misapplication of the company's funds, the auditor is liable: *Leeds Estate Co.* v. *Shepherd* (1887) 36 Ch. D. 787.

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"It is no part of an auditor's duty," as Lindley, L.J., said, in *Re London and General Bank* (No. 2) (1895) 2 Ch. 673, 682, "to give advice either to directors or shareholders as to what they ought to do.

"An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question: How is he to ascertain that position? The answer is, by examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this, his audit would be worse than an idle farce. Assuming the books to be so kept as to shew the true position of a company, the auditor has to frame a balance-sheet showing that position according to the books, and to certify that the balance-sheet presented is correct in that sense. But his duty is to examine the books, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. This is quite in accordance with the decision of Stirling, J., in *Leeds Estate Co.* v. *Shepherd* (1887) 36 Ch. D. 802. An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for an error on his part, even if he were himself

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Auditors.

deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor: He must be honest—*i.e.*, he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion, very little enquiry will be reasonably sufficient, and, in practice, I believe, business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused, more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required. But an auditor is not bound to be suspicious as distinguished from reasonably careful."

Lopes, L.J., in *Re Kingston Cotton Mills Co.* (*No.* 2) [1896] 2 Ch. 284, also says:—"Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and when these frauds are perpetrated by tried servants of the company and are undetected for years by the directors. So to hold, would make the position of an auditor intolerable."

An auditor may be made liable on a misfeasance summons under s. 123 of the Winding-up Act: *Kingston Cotton Mills Co.* (*No.* 2) (1896) 2 Ch. 279.

Auditors are bound to acquaint themselves with their duties under the provisions of the Act. If the balance sheet fails to show the true financial position of the company, and the company suffers damages thereby, the onus is on the auditors of showing that the damage is not the result of their breach of duty: *Re Republic of Bolivia Syndicate, Limited* (*No.* 2) (1914) 1 Ch. 139. *Semble,* also in the same case that adequate

warning or identification in accounts as to wrongful payments appearing therein bringing such wrongful payments to the company's notice will exonerate the auditors. See also on duties of auditors annotation in (1912) 6 D. L. R. 524; *Re Owen Sound Lumber Co.* (1916-7) 38 O. L. R. 414.

Where in a contract between the company and an officer it is provided that the latter's remuneration is to be ascertained by the auditors' certificate as to net profits, if the certificate of the auditors is based on a wrong principle, it is not conclusive and binding upon the parties: *Johnston* v. *Chestergate* (1915) 84 L. J. Ch. 914.

Directors are not bound to test the accuracy of auditors' accounts: *Dovey* v. *Cory* (1901) A. C. 477.

Quære, whether auditors can give a certificate *ad hoc*: *Johnston* v. *Chestergate, supra,* per Sargant, J., at p. 917.

"Books, accounts and vouchers."

Whether the auditor's right of access is restricted to books of account, or covers all books, including minute books and documents, appears to be not altogether free from doubt. In the opinion of Palmer, "Company Law," 9th ed., p. 230, the corresponding section of the Imperial Act, viz., 113 (1), confers this wide right of access, but there is no interpretative section in our Act stating that "books and papers" and "books or papers" include accounts, deeds, writings and documents."

As to procedure for right of access to books and records, see *Baldwin* v. *Bawden* (1912) 6 D. L. R. 520.

Procedure.

Service of process upon company.

95. Any summons, notice, order or other process or document required to be served upon the company, may be served by leaving the same at the office of the company in the city or town in which its chief place of business in Canada is situate, with any adult person in the employ of the company, or by serving the same on the president or secretary of the company, or by leaving the same at the domicile of either of them, with any adult person of his family or in his employ.

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Constructive service.

2. If the company has no known office or chief place of business, and has no known president or secretary, the court may order such publication as it deems requisite to be made in the premises; and such publication shall be deemed to be due service upon the company. 2 E. VII., c. 15, s. 80.

Cases where use of seal not necessary.

96. Any summons, notice, order or proceeding requiring authentication by the company may be signed by any director, manager or other authorized officer of the company, and need not be under the seal of the company. 2 E. VII., c. 15, s. 81.

The section contemplates two classes of documents: those of an extra-judicial and those of judicial character. As to the latter, court process must be served, according to the local rules of procedure in force and applicable. For the rules as to such cases in Ontario see Holmested, Judicature Act, 4th ed., p. 341.

Service of notices on members.

97. Notices to be served by the company upon the shareholders may be served either personally or by sending them through the post, in registered letters, addressed to the shareholders at their places of abode as they appear on the books of the company. 2 E. VII., c. 15, s. 82.

See ss. 87 and 88.

Time from which service reckoned.

98. A notice or other document served by post by the company on a shareholder shall be deemed to be served at the time when the registered letter containing it would be delivered in the ordinary course of post. 2 E. VII., c. 15, s. 83.

Actions between company and shareholders.

99. Any description of action may be prosecuted and maintained between the company and any shareholder thereof. 2 E. VII., c. 15, s. 85.

Setting forth incorporation in legal proceedings.

100. In an action or other legal proceedings, it shall not be requisite to set forth the mode of incorporation of the company, otherwise than by mention of it under its corporate name as incorporated by virtue of letters patent, or of letters patent and supplementary letters patent, as the case may be, under this Part. 2 E. VII., c. 15, s. 86.

Section 99 may be regarded as declaratory. It is a well settled principle that the company as a body is entirely distinct from the shareholders who compose it, and this rule applies even to a "one man company." See *Rielle* v. *Reid* (1899) 26 A. R. 54; *Salomon* v. *Salomon* [1887] A. C. 22; *Wood* v. *Reesor* (1895) 22 A. R. 57.

Whatever doubts may have existed at the time when the Joint Stock Companies Acts were first passed, respecting the right of a shareholder to sue the company, it is now clear that such a right would exist without any statutory enactment such as sec. 99.

Effect of sections 110 & 111.

By the Imperial Companies Act the certificate of registration is made "conclusive evidence" that all the requirements in regard to registration have been complied with. See Dominion Act, ss. 110, 111.

The effect of these and similar sections is that where an action is brought by a company the defendant cannot set up by way of defence that the charter of the company was obtained by fraud, etc., or otherwise irregularly.

In the absence of such provisions irregularity in obtaining a charter would afford a defence to an action by the company. And where a company was incorporated under an Ontario Act which had no similar provisions, it was held to be open to the defendants to show that the corporate character had never been obtained in consequence of the non-performance of conditions plainly required to be precedent to the right to acquire corporate status: *Hamilton and Flamboro Road Co.* v. *Townsend* (1887) 13 A. R. 534. See *Re National Debenture and Assets Corporation* [1891] 2 Ch. 505; *Re Laxon & Co. (No. 2)* [1892] 3 Ch. 555; *Oakes* v. *Turquand* (1867) L. R. 2 H. L. p. 354; *Salomon* v. *Salomon* [1897] A. C. 22.

Scire facias.

The Dominion Act, s. 111, expressly excepts proceedings by *scire facias* or otherwise for the purpose of rescinding or annulling letters patent, but such proceedings may be taken, even in the absence of such provision.

Where the Crown is imposed on by a false suggestion, or where a grant has been made by mistake or in ignorance of some material fact, or it has granted anything which by law it cannot, it may by its prerogative repeal its own grant. And where by several letters

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patent the self-same thing has been granted to several persons, the first patentee is permitted in the meantime at the suit of the Crown to repeal the subsequent letters patent. And in every case of a patent so granted which is injurious to another, the injured party is permitted to use the name of the Crown in a suit by *scire facias* for the repeal of the grant. 2 Wms. Saund. 72, Notes; *R.* v. *Bailiffs of Bewdley* (1712) 1 P. Wms. 207; *Mayor of Colchester* v. *Brooke* (1845) 7 Q. B. 385; *Reg.* v. *Arnaud* (1846) 9 Q. B. 806; *Banque d'Hochelaga* v. *Murray* (1889) 15 App. Cas. 414.

The action will also lie where a company is authorized to carry on business provided a certain condition is complied with, and there is not compliance. Thus, where a company by its Act of incorporation was authorized to carry on business provided $100,000 of its capital stock were subscribed for and thirty per cent. paid thereon, within six months after the passing of the Act, and only $60,500 had been *bona fide* subscribed prior to the commencing of the operations of the company, the balance having been subscribed for by G. in trust, who subsequently surrendered a portion of it to the company, and the thirty per cent. had not been in fact paid thereon, it was held that this being a Dominion statutory charter proceedings to set it aside were properly taken by the Attorney-General of Canada, and that the *bona fide* subscription of $100,000 within six months from the date of the passing of the Act of incorporation, and the payment of the thirty per cent. thereon, were conditions precedent to the legal organization of the company with power to carry on business, and as these conditions had not been *bona fide* and in fact complied with within such six months the Attorney-General of Canada was entitled to have the company's charter declared forfeited: *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada* (1892) 21 S. C. R. 72.

And in a proper case, such as a charter obtained by fraudulent application for letters patent, the defendant, in an action by the company, may apply to the

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Attorney-General to obtain a writ of *scire facias* with the object of defeating the plaintiff's action against him: *Banque d'Hochelaga* v. *Murray* (1889) 15 App. Cas. 414.

See also on *scire facias Cie des Boissons* v. *Procureur General* (1906) Q. R. 15 K. B. 546, and on cancellation *A. G.* v. *Toronto Junction Recreation Club* (1904) 8 O. L. R. 440.

See also notes to s. 27.

Against a shareholder.

Scire facias was formerly held to be a proper and appropriate proceeding against a shareholder by a creditor who holds an unsatisfied execution against the company: *Brice* v. *Munro* (1885) 12 A. R. p. 465; *Moore* v. *Kirkland* (1856) 5 C.P. 452; *Jenkins* v. *Wilcock* (1862) 11 C. P. 505; *Fraser* v. *Hickman* (1863) 12 C. P. 584; *Tyre* v. *Wilkes* (1856) 13 U. C. R. 482.

See also *Union Fire Insurance Co.* v. *Fitzsimmons* (1882) 32 C. P. 602; *Attorney-General* v. *Vaughan Road Co.* (1892) 19 A. R. 234; and 21 S. C. R. 631; *Attorney-General* v. *Niagara Falls & Clifton R. Co.* (1891) 18 A. R. 453.

Evidence.

A copy of a by-law of the company under its seal and purporting to be signed by an officer of the company, is *prima facie* evidence of the by-law under s. 109. Certain of the books of the company are also made *prima facie* evidence of all facts purporting to be stated in them. See s. 107 *infra*.

As to the evidence by which the fact of incorporation and the contents of the letters patent are proved, see ss. 110 and 111.

Actions against companies.

In actions corporations may usually be served by serving the president, cashier, treasurer, secretary, clerk or other agent of the corporation. See s. 95.

But where the plaintiff obtained judgment by default in any action against the defendant company of which he was president, and the writ in the action was served upon plaintiff only, and there was no other service upon, or notice of the pendency of the action given to, anyone connected with the company or concerned in its affairs, it was held that the mode of ser-

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vice adopted was one that could not be adopted, and that the judge to whom the application was made had the right to set it aside as an abuse of the process of the Court: *Holmes* v. *Stewiacke Railway Co.* (1899) 32 N. S. R. 395.

Actions against companies.

Service on the liquidator of a company is not good service on the company: *Re Flowers* (1896) 75 L. T. 306.

A colonial government and a foreign government are not considered to be corporations: *Sloman* v. *Governor of New Zealand* (1876) 1 C. P. D. 563.

As to the residence of a corporation, see *Bank of Nova Scotia* v. *McKinnon* (1892) 12 C. L. T. 178; *Bank of Toronto* v. *Pickering* (1919) 17 O. W. N. 161, and notes to s. 30.

An action for deceit will lie against a corporation: *Moore* v. *Ontario Investment Association* (1888) 16 O. R. 269; *Barwick* v. *English Joint Stock Bank* (1867) L. R. 2 Ex. 265; *Nelles* v. *Ontario Investment Association* (1889) 17 O. R. 129.

And it may also be liable for false imprisonment under an order of its agent acting within the scope of its authority: *Lyden* v. *Magee* (1888) 16 O. R. 105, but not where the act was one the company "could not legally have done": *Emerson* v. *Niagara Navigation Co.* (1883) 2 O. R. 528.

As to description of a company in a writ of summons, see *Bank of British North America* v. *Howley,* 14 Que. S. C. 422.

A corporation has the same right as an individual to withdraw its name from litigation to which it has been made a party plaintiff, but of which it does not approve: *International Wrecking Co.* v. *Murphy* (1888) 12 P. R. 423.

The company itself is the proper plaintiff in actions for injury to the corporate property, and such an action by shareholders alone, showing no reason why the company has not instituted the proceedings, cannot be sustained.

But where the complaint was that a majority of the shareholders had obtained possession of the company's name and the control of its seal, and were using it improperly for their own benefit and causing injury to the company's property, it was held that an action could be sustained in the name of one or more shareholders, on behalf of themselves and all others except defendants, against the company and the majority of the shareholders: *Wilberforce Educational Institute* v. *Holden* (1884) 17 O. R. 439.

As to an action brought in the name of the company after a liquidator has been appointed, see *Sarnia Agricultural Implement Manufacturing Co.* v. *Hutchinson* (1884) 17 O. R. 676.

In order that an action by one shareholder may be maintained on behalf of the company, though he sues on behalf of himself as well as all shareholders other than the defendants, it is not sufficient to show that the company was under the absolute control of the defendants in the action, unless it is clearly indicated that the control was exercised at the time the action was commenced: *Weatherbe* v. *Whitney* (1897) 30 N. S. R. 49.

Where an action is taken by the shareholders of a company against a shareholder-director such defendant should be excepted from the general body of shareholders referred to in the style of cause as plaintiffs: *Wheeler* v. *Freame and Alberta Farmers* (1914) 7 W. W. R. 191.

Where the defendant referred to the directors as having appointed themselves by fraudulent means, and stated that all business transacted by them was contrary to law, it was held that the statement was defamatory of the plaintiff company, and the company might sue for libel: *Owen Sound Building and Savings Society* v. *Meir* (1893) 24 O. R. 109. See also *Journal Printing Co.* v. *McLean* (1894) 25 O. R. 509.

Where a man was initiated into a secret order in the presence of the principal officers and a number of members of the order, and was injured by rough usage, it was held that proceedings must be taken to have been

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done with the consent of the corporate body, and that the defendants were liable in damages for the injuries sustained: *Kinver* v. *Phœnix Lodge I. O. O. F.* (1885) 7 O. R. 377.

Where a contract is *ultra vires* of a company, but a consent judgment is obtained upon it, the question of *ultra vires* not having been raised on the pleadings or facts stated, it has been held that the consent judgment was of no greater validity than the contract, and that an action would lie to set it aside: *Great North-West Ry. Co.* v. *Charlebois* [1899] A. C. 114.

Actions against companies.

Where the plaintiff was employed by one of the provisional directors of the defendant railway company to do certain work on behalf of the company in advertising and promoting its undertaking and the evidence established that this director was intrusted by the company with the performance of the various duties necessary for the purpose of promoting and furthering the undertaking; and that he did this, from time to time, without any specific instructions from his co-directors at formal meetings of the board, everything being done in the most informal manner; but that they were fully cognizant of what he did and of his manner of doing it, and vested in him, either tacitly or by direct authorization, the right and authority to transact the business of the company. Held, that the plaintiff was entitled to recover from the company the value of his work: *Allen* v. *Ontario and Rainy River R. Co.* (1898) 29 O. R. 510.

As to an action for goods supplied to an inchoate company, see *Seiffert* v. *Irving* (1888) 15 O. R. 173.

Where by an Act extending the powers of a gas company certain duties and obligations were imposed on it for the benefit of its customers with a view to the reduction of the price of gas contingent on the amount of surplus net profit, but no pecuniary penalty was imposed for default and no right of action given to persons aggrieved, provision, however, being made for its accounts being audited by direction of the mayor of the corporation with whose assent the com-

pany was originally established. Held, that no individual customer had a right of action against the company for non-compliance with the provisions of the Act. Such a right only arises where given by the Act, and especially so where the Act, as in this case, is in the nature of a private legislative bargain and not one of public and general policy: *Johnston and Toronto Foundry Co.* v. *Consumers' Gas Co.*, (1898) A. C. 447.

See also *Montreal Street Railway Co.* v. *Ritchie*, 16 S. C. R. 622; *Flatt* v. *Waddell, Townsend* v. *Waddell*, 18 O. R. 539; *McSherry* v. *Commissioners of the Cobourg Town Trust* (1880) 45 U. C. R. 250; *Walmsley* v. *Rent Guarantee Co.* (1881) 29 Gr. 484; *Wilson* v. *Ætna Life Assurance Co.* (1879) 8 P. R. 131; *Christopher* v. *Noxon* (1884) 4 O. R. 672.

And as to the examination of a company as a judgment debtor, see *Charlebois* v. *Great North-West R. Co.* (1892) 15 P. R. 10.

As to proceedings against companies by summons or indictment, see *The Queen* v. *Toronto Railway Co.* (1898) 30 O. R. 214; *Re Chapman & City of London* (1890) 19 O. R. 33.

Procedure to settle ownership when shares are transmitted otherwise than by transfer.

101. Whenever the interest in any shares of the capital stock of the company is transmitted by the death of any shareholder or otherwise, or whenever the ownership of any shares or the legal right of possession of the same changes by any lawful means, other than by transfer according to the provisions of this Part, and the directors of the company entertain reasonable doubts as to the legality of any claim to such shares, the company may make and file in the court in the province or territory in which the head office of the company is situated, a declaration and petition in writing, addressed to the justices of the court, setting forth the facts and the number of shares previously belonging to the person in whose name such shares stand in the books of the company, and praying for an order or judgment adjudicating and awarding the said shares to the person or persons legally entitled to the same. 2 E. VII., c. 15, s. 53.

Order of court may be obtained on petition.

Notice of intention to present.

102. Notice of the intention to present such petition shall be given to the person claiming such shares, or to the attorney of such person duly authorized for the purpose, who shall, upon the filing of such petition, establish his right to the shares referred

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to in such petition; and the time to plead and all other proceedings in such cases shall be the same as those observed in analogous cases before such court. 2 E. VII., c. 15, s. 53.

Pleading.

Costs.

103. The costs and expenses incurred by the company in procuring such order or judgment shall be paid to the company by the person or persons to whom such shares are declared lawfully to belong and such shares shall not be transferred in the books of the company until such costs and expenses are paid, but this provision shall in no way prejudice the right of the person adjudged to be the lawful owner of such shares to recourse according to the practice of the court for such costs and expenses against any person contesting his right to such shares, 2 E. VII., c. 15. s. 53.

Order to guide company.

Order a release.

104. The company shall be guided by the order or judgment of the court establishing the right to such shares.

2. Such order or judgment shall have the effect of a release from every other claim to the said shares or arising in respect thereof and shall fully indemnify and save harmless the said company from any such claim. 2 E. VII., c. 15, s. 53.

The procedure laid down by these sections does not appear to have been made much use of; for a case in the province of Quebec, see *In re Denoon* (1899) Q. R. 15 S. C. 567. Where there are competing claimants for shares the proper course for the company is to interplead, *Re Underfeed Stoker Co.* (1901) 1 O. L. R. 42. For the procedure on the death of a shareholder and an application for registration by his executors or administrators or a transfer from them, see the notes to ss 64ff. "Transfer of Shares."

Statements and Returns.

Annual meeting.

105. (1) An annual meeting of the company shall be held at such time and place in each year as the special Act, letters patent, or by-laws of the company provide, and in default of such provisions in that behalf an annual meeting shall be held at the place named in the special Act or letters patent as the place of the head office of the company, on the fourth Wednesday in January in every year.

(2) At such meeting the directors shall lay before the company,—

Balance sheet.

(*a*) a balance sheet made up to a date not more than four months before such annual meeting: Provided however that a company which carries on its undertaking out of

Canada may, by resolution at a general meeting, extend this period to not more than six months; Sect. 105.

(*b*) a general statement of income and expenditure for the financial period ending upon the date of such balance sheet;

(*c*) the report of the auditor or auditors;

(*d*) such further information respecting the company's financial position as the special Act, letters patent or by-laws of the company require.

(3) Every balance sheet shall be drawn up so as to distinguish severally at least the following classes or assets and liabilities, namely:— Details of balance sheet.

(*a*) cash;

(*b*) debts owing to the company from its customers;

(*c*) debts owing to the company from its directors, officers and shareholders respectively;

(*d*) stock in trade;

(*e*) expenditures made on account of future business;

(*f*) lands, buildings, and plant;

(*g*) goodwill, franchises, patents and copyrights, trademarks, leases, contracts and licenses;

(*h*) debt owing by the company secured by mortgage or other lien upon the property of the company;

(*i*) debts owing by the company but not secured;

(*j*) amount of common shares, subscribed for and allotted and the amount paid thereon, showing the amount thereof allotted for services rendered, for commissions or for assets acquired since the last annual meeting;

(*k*) amount of preferred shares subscribed for and allotted and the amount paid thereon, showing the amount thereof allotted for services rendered, for commissions or for assets acquired since the last annual meeting;

(*l*) indirect and contingent liabilities. *Ontario Companies Act, s. 45.*

(*m*) amount written off on account of depreciation of plant, machinery, good-will and similar items. *New.* 7-8 Geo. V., 1917, c. 25, s. 12.

See the notes to ss. 87ff. *supra.*

106. (1) Every company having a share capital shall, on or before the first day of June in every year, make a summary as of date the thirty-first day of March preceding, specifying the following particulars:— Annual returns.

(*a*) The corporate name of the company; Particulars.

(*b*) The manner in which the company is incorporated whether by special Act or by letters patent and the date thereof;

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(*c*) The place of the head office of the company, giving the street and number thereof when possible;

(*d*) The date upon which the last annual meeting of shareholders of the company was held;

(*e*) The amount of the share capital of the company, and the number of shares into which it is divided;

(*f*) The number of shares taken from the commencement of the company up to the date of the return;

(*g*) The amount called up on each share;

(*h*) The total amount of calls received;

(*i*) The total amount paid on shares otherwise than in cash, showing severally the amounts paid by services, commissions or assets acquired since the last annual return;

(*j*) The total amount of calls unpaid;

(*k*) The total amount of the sums (if any) paid by way of commission in respect of any shares, bonds or debentures, or allowed by way of discount in respect of any bonds or debentures;

(*l*) The total number of shares forfeited, and the amount paid thereon at the time of forfeiture;

(*m*) The total amount of shares issued as preference shares and the rate of dividend thereon, and whether cumulative;

(*n*) The total amount paid on such shares;

(*o*) The total amount of debentures, debenture stock or bonds authorized and the rate of interest thereon;

(*p*) The total amount of debentures, debenture stock or bonds issued;

(*q*) The total amount paid on debentures, debenture stock or bonds, showing severally the amounts of discount thereon and the amounts issued for services and assets acquired since the last annual return;

(*r*) The total amount of share warrants issued;

(*s*) The names and addresses of the persons who at the date of the return are the directors of the company, or occupy the position of directors, by whatever name called.

Summary to be filed signed and verified.

(2) The said summary must be completed and filed in duplicate in the Department of the Secretary of State of Canada on or before the first day of June aforesaid. Each of the said duplicates shall be signed by the president and the manager or, if these are the same person, by the president and by the secretary of the company, and shall be duly verified by their affidavits. There shall also be filed therewith an affidavit proving that the copies of the said summary are duplicates. *New.*

Penalty for default.

(3) If a company makes default in complying with any requirement of this section it shall be liable to a fine not exceeding twenty dollars for every day during which the default continues, and every director and manager of the company who knowingly and wilfully authorizes or permits the default shall

be liable to the like penalty, and such fines may be recoverable on summary conviction. *Ontario Companies Act, sec. 134 in part, and Imperial Companies Act, sec. 26 in part.*

Endorsement of summary.

(4) The Secretary of State of Canada, or an official of the Department of the Secretary of State of Canada designated for that purpose, shall endorse upon one duplicate of the above summary the date of the receipt thereof at the Department of the Secretary of State of Canada, and shall return the said duplicate summary to the company and the same shall be retained at the head office of the company available for perusal of for the purpose of making copies thereof or extracts therefrom by any shareholders or creditor of the company. *New.*

Proof of endorsement.

(5) The duplicate of the said summary endorsed as aforesaid shall be *prima facie* evidence that the said summary was filed in the Department of the Secretary of State of Canada pursuant to the provisions of this section on any prosecution under subsection (3) of this section, and the signature of an official of the Department of the Secretary of State of Canada to the endorsement of the said duplicate shall be deemed *prima facie* evidence that the said official has been designated to affix his signature thereto. *New.*

Proof of failure to file summary.

(6) A certificate under the hand and seal of office of the Secretary of State of Canada that the aforesaid summary in duplicate was not filed in the Department of the Secretary of State of Canada by a company pursuant to the provisions of this section shall be *prima facie* evidence on a prosecution under subsection (3) of this section that such summary was not filed in the Department of the Secretary of State of Canada. *New.*

Companies exempt.

(7) Companies organized after the thirty-first day of March in any year shall not be subject to the provisions of this section until the thirty-first day of March of the following year. *New.*

Effect of failure to file summary for three years.

(8) The name of a company which, for three consecutive years, has omitted to file in the Department of the Secretary of State of Canada the said annual summary may be given in whole or in part to a new company unless the defaulting company, on notice by the Secretary of State of Canada by registered letter addressed to the company or its president as shown by its last return, proves to the satisfaction of the Secretary of State of Canada that it is still a subsisting company: Provided that if at the end of one month from the date of such notice, the Secretary of State of Canada has not received from the company or its president response to such notice, the company may be deemed not to be a subsisting corporation, and no longer entitled to the sole use of its corporate name: Provided also that when no annual summary has been filed by a company for three years immediately following its incorporation its name may be given to another company without notice, and

Sect. 106. such company shall be deemed not to be subsisting. *Ontario Companies Act, sec. 36.*

Application of section.

(9) This section shall, *mutatis mutandis*, be applicable to corporations without share capital with respect to a summary setting out the particulars referred to in paragraphs (*a*), (*b*), (*c*), (*d*), (*o*), (*p*), and (*q*) of subsection (1) of this section and to directors, managers and other officers of such corporations. *New.* 7-8 Geo. V., 1917, c. 25, s. 12.

Cf. Imperial Companies (Consolidation) Act, 1908 s. 26.

The penalty imposed on directors is for knowingly and wilfully authorizing a default. Being a director is *primâ facie* evidence of having knowingly and wilfully authorized the default: *Gibson* v. *Barton*, (1875) L. R. 10 Q. B. 329; *Edmonds* v. *Foster* (1875) 45 L. J. M. C. 41; and this rule applies to *de facto* directors or officers: *Gibson* v. *Barton, supra.* As to what constitutes wilfully permitting default, see *Seagram* v. *Pneuma Tubes, Ltd.* (1919) 43 O. L. R. 513 (App. Div.); *Park* v. *Lawton* (1911) 1 K. B. 588.

If this section is not complied with, there is a continuing default, no matter how many days may have elapsed: *R.* v. *Catholic Life and Fire Insurance Co.* (1883) 48 L. T. 675. In this case there was default for five years.

"Duplicate" is a document which is the same in all respects as some other instrument from which it in indistinguishable in its essence and its operation. It is perhaps a more exact word than copy or even than the term true copy, for in these there may be more or less variation from the original. Even with latitude of construction a duplicate must bear the meaning of a document identical with another in all essential respects: *Towner* v. *Hiawatha Gold Mining Co.* (1899) 30 O. R. 547; *Toms* v. *Cumming* (1843) 8 Scott N. R. p. 917; *Lewis* v. *Roberts* (1861) 11 C. B. N. S. p. 29.

Where the name of a shareholder was contained in the list transmitted to the Provincial Secretary, but omitted in the list posted up in the head office of the company, it was held that the lists were not duplicates

and that the company was liable to the penalty: *Towner* v. *Hiawatha Gold Mining Co., supra.* Sect. 106.

The section contains no provision similar to s. 135 (6) of the Ontario Act R. S. O. (1914) c. 178 to enable a private person to sue on his own behalf for the recovery of the penalty on obtaining the proper consent. Where an obligation is created by a statute for the benefit of the public generally there is no separate right of action for every person injured by a breach thereof in no other manner than the rest of the public: *Clegg* v. *Earby Gas Co.* (1896) 1 Q. B. at p. 594. Thus it was held that there was no individual right of action to enforce compliance with the provisions of the statutes of Nova Scotia requiring the filing of certain information by foreign companies transacting business in the province, even where no penalty was provided by the act in the event of a breach: *Merritt* v. *Copper Crown* (1903-04) 36 N.S.R. 383.

Evidence.

107. All books required by this Part to be kept by the company shall in any action, suit or proceeding against the company or against any shareholder be *prima facie* evidence of all facts purporting to be thereby stated. 2 E. VII., c. 15, s. 78. Books to be *prima facie* evidence, when.

Entries in the books of a company at common law are evidence against the company in respect of the matters to which the entries relate in the same way as books kept by a tradesman are: *Re Branksea Island Co.*, 1 Meg. C. R. 12. Common law.

The books, which are made *primâ facie* evidence by these sections, are those containing the copies of the letters patent, the names of the shareholders of the company with their address, the stock ledger containing the number of shares held by each shareholder and the amounts paid in and unpaid thereon, the register of transfers containing the date and particulars of all transfers of stock, and the book containing the names and addresses of past and present directors of the company. These books are also open to the inspection of creditors and shareholders of the company.

Sect. 107. Books prima facie evidence.

The books of account of the company, and the minute book of the board of directors and the company, are not required to be kept open for inspection, nor are they made *primâ facie* evidence as in the former case. See ss. 89-91.

Application of section.

It should be observed that the section applies only in actions, suits, or proceedings against the company or a shareholder. Thus, though such books will be evidence against the company, they can not be used against any one sought to be made liable as a shareholder until he has been otherwise proved to be such. Nor if a proceeding of this nature is instituted by a liquidator is it to be deemed to be one "between contributories of the company" so as to make the books evidence against the alleged shareholder by virtue of s. 144 of the Winding-up Act: *Re International Electric Co., Ltd., McMahan's Case* (1914) 31 O. L. R. 348.

Where books are declared to be *prima facie* evidence the case thereby made out may be rebutted by other evidence: *Arnot's Case* (1887) 36 Ch. D. 702; *Re International Electric Co. Ltd., McMahan's Case, supra*, at p. 358.

The following American cases may also be referred to:—

The company's books cannot be used as evidence against a stranger to connect him with the corporation, and where a person had subscribed for stock under the condition expressed in the contract that he was not to be liable until $5,000 should be first raised, he was held not to be a member of the corporation so as to make the books evidence against him in a suit for calls: *Chase* v. *Sycamore, etc., R. Co.* 38 Illinois 215.

Decisions.

It has been held, however, by the Supreme Court of the United States that when the name of an individual appears on the books of a corporation as a stockholder he is presumed to be the owner of the stock and the onus is cast on him of showing that such is not the case: *Turnbull* v. *Payson,* 95 U. S. 418.

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Entries in books.

At common law entries in corporation books, which are of a public nature are provable either by the production of the original books or by examined copies: *Brocas* v. *Lord Mayor of London* (1766) 1 Stra. 307.

Entries of a private nature must be proved by the production of the original, and copies, though long preserved among the corporate papers, are not admissible: *R.* v. *Gwyn* (1767) 1 Stra. 401.

Entries in the public books of a corporation, made by the proper officer, are at common law evidence, even against strangers, of the public acts of the corporation; but the books must have been publicly kept as the corporation books: *Shrewsbury* v. *Hart*, 1 C. & P. 114; and the entries made by the usual officer or his substitute: *R.* v. *Mothersell* (1764) 1 Stra. 93.

Entries in the public books of a corporation as to private matters, and entries in private books, are only receivable as admissions against a corporation in the absence of express provision: *Hill* v. *Manchester Waterworks* (1833) 5 B. & Ad. 866. But see *Corporation of Waterford* v. *Price* (1847) 9 Irish L. R. 310; *Hallmark's Case* (1878) 9 Ch. D. 329, where members had acquiesced in them.

A company's books have been received in evidence notwithstanding the omission of a shareholder's address or the amount paid up. See *Wolverhampton, etc., Co.* v. *Hawksford* (1861) 11 C. B. N. S. 456. A paper containing the names of the shareholders was rejected in this case as not being a "register," and in *Re Printing, etc., Co.* (1894) 2 Ch. 392, similarly, a series of allotment sheets not intended as a register under the Imperial Act.

The court will, however, where the case demands it, take cognizance of entries in books irregularly or improperly kept: *Re Sprouted Food Co., Hudson's Case* (1905) 6 O. W. R. 514; and see *Union Bank* v. *Morris* (1900) 27 A. R. 396; *Central Bank, Baines' Case* (1889) 16 A. R. 237; *Boultbee* v. *Gzowski* (1898-99) 29 S. C .R. 54.

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The making of false entries in the books required to be kept, or refusal or wilful neglect to make any proper entry therein or permit inspection and the taking of extracts, is an indictable offence, s. 117. For the penalty imposed on refusal to produce books to an inspector appointed under s. 92 or 93, see s. 92 (5).

Proof of service by registering letter.

108. Proof that any letter properly addressed and registered containing any notice or other document permitted by this Part to be served by post was properly addressed and registered and was put into the post office, and of the time when it was so put in, and of the time requisite for its delivery in the ordinary course of post, shall be sufficient evidence of the fact and time of service. 2 E. VII., c. 15, s. 83.

Evidence of by-laws.

109. A copy of any by-law of the company under its seal and purporting to be signed by any officer of the company shall be received as against any shareholder of the company as *prima facie* evidence of such by-law in all courts in Canada. 2 E. VII., c. 15, s. 84.

Proof of incorporation.

110. In an action or other legal proceeding, the notice in the *Canada Gazette* of the issue of letters patent or supplementary letters patent under this Part shall be *prima facie* proof of all things therein contained, and on production of such letters patent or supplementary letters patent or of any exemplification or copy thereof, the fact of such notice and publication shall be presumed. 2 E. VII., c. 15, s. 86.

Proof of matters set forth in letters patent.

111. Except in any proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling letters patent or supplementary letters patent issued under this Part, such letters patent or supplementary letters patent, or any exemplification or copy thereof, shall be conclusive proof of every matter and thing therein set forth. 2 E. VII., c. 15, s. 86.

See the notes on ss. 110 and 111 under ss. 97-100, *supra*.

Secondary evidence of the charter has been held inadmissible: *Carrick* v. *Canada Pipe &c., Co.* (1893) Q. R. 3 S. C. 383; and see *Ex p. Ault & Wibourg* (1914) 42 N. B. R. 548.

Proof by declaration or affidavit.

112. Proof of any matter which is necessary to be made under this Part may be made by oath or affirmation, or by solemn declaration before any justice of the peace, or any commissioner for taking affidavits, to be used in any of the courts in any of the provinces of Canada, or any notary public, each

of whom is hereby authorized and empowered to administer oaths and receive affidavits and declarations for that purpose. 2 E. VII., c. 15, s. 87.

Sects. 113-116.

Offences and Penalties.

Penalties.

113. Every one who, being a director, manager or officer of a company, or acting on its behalf, commits any act contrary to the provisions of this Act, or fails or neglects to comply with any such provision, shall, if no penalty for such act, failure or neglect is expressly provided by this Act, be liable, on summary conviction, to a penalty of not more than one thousand dollars, or to imprisonment for not more than one year, or to both such penalty and imprisonment: Provided no proceeding shall be taken under this section without the consent in writing of the Secretary of State of Canada. 7 & 8 Geo. V. (1917), c. 25, s. 14.

Neglect to keep painted or affixed name of company and word 'limited.'

Penalty.

114. Every company which does not keep painted or affixed its name, with the word *limited* after it, in manner directed by this Part shall incur a penalty of twenty dollars for every day during which such name is not so kept painted or affixed, and every director and manager of the company, who knowingly and wilfully authorizes or permits such default, shall be liable to the like penalty. 2 E. VII., c. 15, s. 25.

Not having word 'limited' on seal.

On notice.

Bill or note.

Bill of parcels.

Penalty.

115. Every director, manager or officer of the company, and every person on its behalf, who uses or authorizes the use of any seal purporting to be a seal of the company, whereon its name with the word *limited* after it, is not engraven in legible characters; or,—

(*a*) issues, or authorizes the issue of any notice, advertisement or other official publication of such company; or,

(*b*) signs or authorizes to be signed on behalf of such company, any bill of exchange, promissory note, endorsement, cheque, order for money or goods; or,

(*c*) issues or authorizes to be issued any bill of parcels, invoice or receipt of the company;

wherein its name, with the said word after it, is not mentioned in legible characters, shall incur a penalty of two hundred dollars, and shall also be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company. 2 E. VII., c. 15, s. 25.

Neglect to keep books.

Penalty.

116. Every company who neglects to keep any book or books required by this Part to be kept by the company, shall be guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding twenty dollars for each day that such neglect continues. 2 E. VII., c. 15, s. 77.

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False entries in and refusing inspection of books.

Penalty.

117. Every director, officer or servant of the company, who knowingly makes or assists in making any untrue entry in any book required by this Part to be kept by the company, or who refuses or wilfully neglects to make any proper entry therein, or to exhibit as required by this Part any entry made therein, or to allow the same, as required by this Part, to be inspected and extracts to be taken therefrom, is guilty of an indictable offence. 2 E. VII., c. 15, s. 76.

Compare the Criminal Code, s. 414, which reads as follows:—

Criminal Code.

"Every one is guilty of an indictable offence and liable to five years imprisonment who, being a promoter, director, public officer or manager of any body corporate or public company, either existing or intended to be formed, makes, circulates or publishes, or concurs in making, circulating or publishing, any prospectus, statement or account which he knows to be false in any material particular, with intent to induce persons whether ascertained or not to become shareholders or partners, or with intent to deceive or defraud the members, shareholders, or creditors, or any of them whether ascertained or not, of such body corporate or public company or with intent to induce any person to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof."

The effect of the provisions of the Criminal Code was discussed in the case of the *Queen* v. *Gillespie* (1898) 1 Can. Cr. Cas. 551. There the defendant was a director of a company carrying on business at Penetanguishene, and was charged with circulating an account of the financial position of the company, of which he was a director, knowing it to be false in every material particular, with intent to defraud and deceive certain of its creditors. The statements complained of were mailed to Montreal creditors. The defendant had assigned certain of the assets which appeared in his statement to other creditors previous to making the statement and the amount of the stock at the last stocktaking was grossly exaggerated. It was held by the Court of the Queen's Bench of Quebec—

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(1) That the offence might be tried in the Province in which the statement was despatched by mail to the party defrauded, or in the Province in which it was received by mail at the address to which the defendant directed it.

(2) The offence is, in such a case, commenced in the Province where the letter containing the statement was mailed, and is continued and completed in the Province to which it was sent, and under s. 553 (now s. 584) of the Code will be considered as committed in either jurisdiction.

(3) A magistrate of the jurisdiction to which the letter is addressed, and in which it is received by the defrauded party, may take the complaint in such a case and compel the arrest of the defendant by a warrant executed in the Province from which the letter was despatched.

See also *Reg.* v. *Birt* (1894) 63 J. P. 328.

118. This section was repealed by 7 & 8 Geo. V. (1917), c. 25, s. 16.

Refusing to produce books and answer questions.

Penalty.

119. Any officer or agent who on any examination by any inspector appointed by a judge or by the company under this Part, refuses to produce any book or document relating to the affairs of the company or to answer any question relating to the affairs of the company, shall incur a penalty not exceeding twenty dollars in respect of each offence. 2 E. VII., c. 15, s. 79.

PART II.

Companies Clauses.

This part of the Act applies to companies incorporated by Special Act of the Dominion Parliament after June 22nd, 1869, with the following exceptions:—

1. Railways, banks and insurance companies (s. 121).
2. No portion of Part II inconsistent with Part III applies to any company subject to Part III; and no portion of Part II declared by letters patent

Part II.

incorporating any company under Part III not to apply to such company, shall apply thereto (s. 122).

3. The Loan Companies Act, 1914, applies and Part II of the Companies Act does not apply to any loan company incorporated by Dominion Act after June 12th, 1914 (4-5 Geo. V. c. 40, s. 3).
4. Similar provisions as regards trust companies are enacted by the Trust Companies Act, 1914 (4-5 Geo. V. c. 55).
5. The Companies Act Amendment Act, 1917 (7-8 Geo. V. c. 25, s. 17), provides that the following sections of the principal Act shall apply to companies to which Part II applies, except those loan companies and trust companies to which that part continues to apply. These sections are:—

Sections 43, 43A-43D; sections 69A-69L; [section 69M (added by 8-9 Geo. V. c. 14, s. 1) does not apply]; section 75 (2); sections 92-94; 94A-94C; sections 105 and 106.

Since the Loan Companies Act, 1914, and the Trust Companies Act, 1914, and the enactment of section 7A by the Companies Act Amendment Act, 1917, providing for the incorporation of corporations without pecuniary gain, Part II has lost much of its importance and in ordinary practice the provisions have to be dealt with so infrequently that it is considered unnecessary to set out and annotate this part.

PART III.

Loan Companies.

This part applies to loan companies; but the Loan Companies Act, 1914, provides that no letters patent incorporating a loan company shall, since June 12th, 1914, be issued under this part (s. 4). Certain sections of the same Act are also made applicable to loan companies previously incorporated under Part III. The

sections are not set out or annotated as they rarely fall to be considered in ordinary practice.

Parts IV.-VI.

PARTS IV TO VI.

These parts respectively contain provisions applicable to British Loan Companies, British and Foreign Mining Companies, and loan companies, and as they relate to special classes of companies they are not set out or annotated.

SCHEDULE.

FORM *A*.

Application for Incorporation under the Companies Act.

To the Honourable the Secretary of State of Canada:

The application of
respectfully showeth as follows:—

The undersigned applicants are desirous of obtaining letters patent under the provisions of the first Part of the Companies Act, constituting your applicants and such others as may become shareholders in the company thereby created a body corporate and politic under the name of
limited, or such other name as shall appear to you to be proper in the premises.

The undersigned have satisfied themselves and are assured that the proposed corporate name of the company under which incorporation is sought is not the corporate name of any other known company incorporated or unincorporated or any name liable to be confounded therewith or otherwise on public grounds objectionable.

Your applicants are of the full age of twenty-one years.

The purposes for which incorporation is sought by the applicants are:

The chief place of business of the proposed company within Canada will be at in the county of
in the province of .

The amount of the capital stock of the company is to be $.

The said stock is to be divided into
shares of $ each.

Application for incorporation.

The following are the names in full and the address and calling of each of the applicants with the amount of stock taken by each applicant respectively:

Applicant.	Amount of Stock Subscribed.

The said
will be the first or provisional directors of the company.

A stock book has been opened and a memorandum of agreement by the applicants under seal in accordance with the statute has been executed in duplicate, one of the duplicates being transmitted herewith.

The undersigned therefore request that a charter may be granted constituting them and such other persons as hereafter become shareholders in the company, a body corporate and politic for the purposes above set forth.

Signatures of Witnesses.	Signatures of Applicants.

Dated at this day of 19 .

NOTE.—If any cash has been paid in on stock or if any property is intended to be accepted on account of stock it should be here stated.

Form B.

(To be executed in duplicate; one duplicate to be transmitted with the application.)

Memorandum of agreement and stock book.

The Company of (Limited).

MEMORANDUM OF AGREEMENT AND STOCK BOOK.

We the undersigned do hereby severally covenant and agree each with the other to become incorporated as a company under the provisions of the first Part of the Companies Act, under the name of the Company of (Limited), or such other name as the Secretary of State may give to the company, with a capital of dollars, divided into shares of dollars each.

And we do hereby severally, and not one for the other, subscribe for and agree to take the respective amounts of the capital stock of the said company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.

In witness whereof we have signed.

Name of Subscriber.	Seal.	Amount of Subscription	Date and Place of Subscription.		Residence of Subscriber.	Name of Witness.
			Date.	Place.		

Form C.

Public notice is hereby given that under the first Part of the Companies Act, letters patent have been issued under the seal of the Secretary of State, bearing date the day of incorporating (*here state names, address, and calling of each corporator named in the letters patent*) for the purpose of (*here state the undertaking of the company, as set forth in the letters patent*), by the name of (*here state the*

Form C. *name of the company as in the letters patent*) with a total capital stock of dollars divided into shares of dollars.

Dated at the office of the Secretary of State of Canada, this day of 19 .

A. B.,
Secretary.

FORM D.

Public notice is hereby given that under the first Part of the Companies Act, supplementary letters patent have been issued under the seal of the Secretary of State, bearing date the day of , whereby the undertaking of the company has been extended to include (*here set out the other purposes or objects mentioned in the supplementary letters patent*).

Dated at the office of the Secretary of State of Canada, this day of 19 .

A. B.,
Secretary.

FORM E.

Public notice is hereby given that under the first Part of the Companies Act, supplementary letters patent have been issued under the seal of the Secretary of State, bearing date the day of , whereby the total capital stock of (*here state the name of the company*) is increased (*or* reduced, *as the case may be*) from dollars to dollars.

Dated at the office of the Secretary of State of Canada, this day of 19 .

A. B.,
Secretary.

2 E. VII., c. 15, sch. 1.

FORM F. **Form F.**

THE COMPANIES AMENDMENT ACT, 1917.

Statement in lieu of prospectus.

STATEMENT IN LIEU OF PROSPECTUS.

Fyled by Limited.

Pursuant to section 43c of The Companies Amendment Act, 1917.

Presented for fyling by

The nominal share capital of the company.	$
Divided into ..... *(Here show the several classes of shares and the amount of each class.)*	Shares of $ Each " $ " " $ "
Names, description, and addresses of directors or proposed directors.	
Minimum subscription (if any) fixed by the letters patent, supplementary letters patent or by-laws on which the company may proceed to allotment.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid-up otherwise than in cash. The consideration for the intended issue of those shares and debentures.	1. shares of $ fully paid. 2. shares upon which $ per share credited as paid. 3. debenture $ 4. Consideration.
Names and addresses of (*a*) vendors of property purchased or acquired, or proposed to be (*b*) purchased or acquired by the company. Amount (in cash, shares and debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price $ Cash ..... $ Shares ..... $ Debentures ..... $ Goodwill ..... $
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscription for any shares or debentures in the company, or Rate of the commission.	Amount paid " payable. Rate per cent.

(*a*) For definition of vendor, *see* Section 43B, subs. (2) of The Companies Amendment Act, 1917.

(*b*) *See* Section 43B, subs. (3) of The Companies Amendment Act, 1917.

Form F.

FORM F—*Continued.*

Statement in lieu of prospectus.

Estimated amount of preliminary expenses.	$
Amount paid or intended to be paid to any promoter. Consideration for the payment..	Name of promoter. Amount $ Consideration :—
Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the fyling of this statement).	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	
Whether the by-laws contain any provisions precluding holders of shares or debentures receiving and inspecting balance sheets or reports of the auditors or other reports.	Nature of the provisions.

(Signatures of the persons above-named as directors or proposed directors, or of their agents authorized in writing.) .....

.....

.....

(As amended by 8 & 9 Geo. V., 1918, c. 13, s. 4.)

THE ONTARIO COMPANIES ACT.

Introductory Note.

The Ontario Companies Act closely resembles the Dominion Act in most of its provisions, so that it has not seemed to be advisable to set out all the sections of the Act *verbatim*. The course has been adopted of only printing such sections as show considerable departure from the wording of the corresponding Dominion sections, or for which there are no corresponding sections in the Dominion Act. Where the section is not printed, the subject matter is briefly indicated and a reference is made to the notes on the Dominion Act, where a discussion of the subject matter of the section will be found.

ONTARIO COMPANIES ACT,

R. S. O. (1914) c. 178, and Amending Acts.

COMPANIES AND CORPORATIONS.

An Act Respecting Joint Stock and Other Companies.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as *The Ontario Companies Act*. 2 Geo. V. c. 31, s. 1. Short title

2. In this Act, Interpretation.

(*a*) "Company" shall mean a company having a capital divided into shares; "Company."

(*b*) "Corporation" shall include a company whether with or without share capital; "Corporation."

(*c*) "Private Company" shall mean a company as to which by Special Act, Letters Patent or Supplementary Letters Patent "Private company."

(i) The right to transfer its shares is restricted,

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(ii) The number of its shareholders, exclusive of persons who are in the employment of the company, is limited to fifty, two or more persons holding one or more shares jointly being counted as a single shareholder, and

(iii) Any invitation to the public to subscribe for any shares, debentures, or debenture stock of the company is prohibited;

See Dominion Act, s. 43C (3).

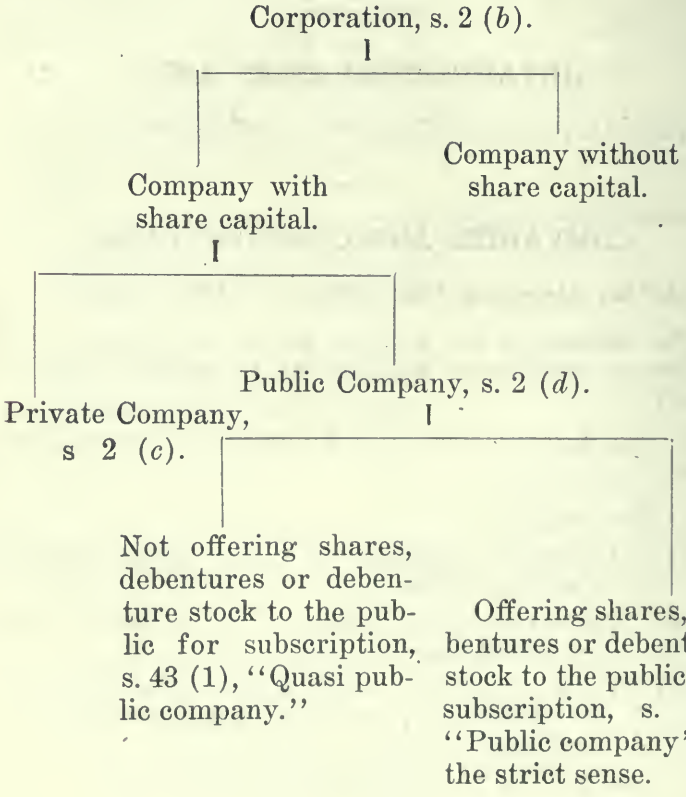
"Public company."

(*d*) "Public Company" shall mean a company not being a Private Company within the meaning of clause (*c*). 2 Geo. V. c. 31, s. 2.

See notes to section 3 of the Dominion Act.

Classes of bodies corporate.

The bodies corporate contemplated by the Ontario Companies Act, R. S. O. 1914, are as in the following table:—



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After the company is organized, for the purpose of subsequent proceedings, *e.g.*, the first or statutory meeting, the Act divides companies into two classes:

(*a*) Companies which do not, and

(*b*) Companies which do,

offer shares, debentures or debenture stock to the public for subscription.

(*a*) In this class fall,

1. Private companies.

2. Quasi public companies.

(*b*) This class is confined to public companies in the strict sense.

Companies in Class (*a*).

Companies which do not offer shares, etc., to public.

The following things must or may be done after incorporation by all companies in class (*a*):

1. The directors may appoint and fix the remuneration of the first auditors before the first meeting of shareholders or members to hold office till the first general meeting: ss. 128 and 133.

2. Except in the case of a private company (s. 102 (2)), a statement in lieu of a prospectus must be filed *before the first allotment* of shares to subscribers other than incorporators, s. 102 (1). The statement must be in form provided by Form 5. A prospectus may be filed if the company prefers.

3. The first meeting *must be held* within *six months* from the date of the letters patent (s. 43). In view of the provisions of s. 44, the by-laws should provide for giving notice of the statutory meeting.

4. A report must be presented by the provisional directors to the meeting, s. 43 (2).

5. The annual meeting must be held in each year, s. 45, and s. 52 provides where meeting must be held.

6. A report must be sent by post by the directors to the shareholders at least 7 days before the annual meeting—s. 45 (2), unless the by-laws otherwise provide (s. (4)).

7. A balance sheet must be presented at the annual meeting in form provided by s. 45 (3).

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The report of auditors must be read at the meeting, s. 134 (3).

8. The company must cause the proper officer to keep the books provided for by s. 118 and by s. 124.

9. The accounts must be audited once in each year, s. 127.

10. Auditors must be appointed by resolution at a general meeting and their remuneration fixed, s. 129 and s. 133.

11. An annual summary of the company's affairs must be made out on or before 1st February in each year in form provided by s. 135.

The form of summary now supplied by the Department provides for a return as to collection of transfer tax on all shares transferred. The summary must be verified, and transmitted to the Provincial Secretary on or before the 8th day of February following. A duplicate with affidavit of verification must be posted up in a conspicuous place in the company's head office on or before the 2nd day of February in each year, and kept so posted until another summary is posted up. The company need not comply with the provisions of the section dealing with the annual summary in the calendar year in which it was organized or went into actual operation, whichever first happened.

12. A return of all changes among the directors of the company must be made from time to time, s. 136.

Companies in Class (b).

Public companies.

The following things must or may be done by public companies, *i.e.*, companies falling within class (*b*) above:—

(1) The directors may appoint and fix remuneration of (s. 133) the first auditors before the first meeting of shareholders to hold office till the first general meeting, s. 128.

(2) A prospectus must be issued before shares, debentures, debenture stock or other securities are offered to the public for subscription (s. 101).

Sections 103 and following contain the statutory provisions governing the preparation, contents, issuing and filing of the prospectus.

(3) Before the first allotment of shares offered to the public is made, the following conditions must have been complied with:—

(a) The minimum amount named in the prospectus, or if none is named, the whole amount of the share capital offered for subscription must have been subscribed (s. 112); and

(b) The sum payable on application for the amount so named, or for the whole amount offered for subscription must have been paid to and received by the company (s. 112).

Note 1st. The amount is reckoned exclusively of any amount payable otherwise than in cash (s. 112 (2)).

Note 2nd. The amount payable on application on each share shall not be less than five per centum of the nominal amount of the share (s. 112 (3)).

Note 3rd. Section 112 only refers to share capital, not bonds or debenture stock.

(4) Then before the company may commence business or exercise any borrowing powers, the following provisions of s. 114 must be complied with:—

(a) Shares held subject to the payment of the whole amount thereof in cash must have been allotted to an amount not less in the whole than the minimum subscription; and,

(b) Every director of the company must have paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered by a public company; and

(c) There must have been filed with the Provincial Secretary a statutory declaration by the secretary or one of the directors in the prescribed form that such conditions have been complied with, and

(d) The company must have obtained from the Provincial Secretary a certificate showing that

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it is entitled to commence business, the fee for which is $25 (s. 114 (2)).

Public companies.

(5) Within two months of the allotment of any shares a return must be filed with the Provincial Secretary, s. 116. The return in the case of an allotment of shares for a consideration other than cash must contain the information called for by the section. The contracts required to be filed with the return in the case of shares issued for a consideration other than cash must be the *originals*. Accordingly, it is important that such contracts should be executed in triplicate.

(6) The statutory meeting must be held within a period of not less than one month nor more than three months *from the date at which the company is entitled to commence business* (s. 117), *i.e.*, the date of the certificate mentioned in s. 114 (2).

In view of the provisions of s. 44, it is important that the by-laws relating to notice of meeting should refer to the statutory meeting also.

The directors must produce a list of shareholders (names, descriptions, addresses and number of shares) at the meeting, which must remain open and accessible to any shareholder during the continuance of the meeting (s. 117 (5)).

The business to be transacted at the meeting is provided for by s. 117 (6).

(7) (*a*) At least 10 days before the meeting, the directors must send every shareholder a report containing the information provided for by s. 117 (2).

(*b*) The report must be certified by not less than two directors (s. 117 (2)).

(*c*) Certain portions of the report must be certified as correct by the auditors, if any, *i.e.*, if they have been appointed by the directors before the statutory meeting (as they may, s. 128) (s. 117 (3)).

(*d*) Forthwith after the report has been sent to the shareholders, a copy certified by not less than two directors must be filed with the Provincial Secretary forthwith (s. 117 (4)).

(8) The annual meeting must be held in each year, s. 45, and s. 52 provides where the meeting must be held.

(9) The prescribed report must be sent by post by the directors to the shareholders at least 7 days before the meeting, s. 45 (2), unless the by-laws otherwise provide (s. 45 (4)).

(10) A balance sheet must be presented at the annual meeting in form provided by s. 45 (3).

The report of auditors must be read at the meeting, s. 134 (3).

(11) The company must cause the proper officer to keep the books provided for by s. 118 and by s. 124.

(12) The accounts must be audited once in each year (s. 127).

(13) Auditors must be appointed by shareholders at the annual meeting and their remuneration fixed, s. 129 and s. 133.

(14) An annual summary of the company's affairs must be made out on or before 1st February in form provided by s. 135.

The form of summary now supplied by the Department provides for a return as to collection of transfer tax on all shares transferred. The summary must be verified, and transmitted to the Provincial Secretary on or before the 8th day of February following. A duplicate with affidavit of verification must be posted up in a conspicuous place in the company's head office on or before the 2nd day of February in each year and kept so posted until another summary is posted up. The company need not comply with the provisions of the section dealing with the annual summary in the calendar year in which it was organized or went into actual operation, whichever first happened.

(15) A return of all changes among the directors must be made from time to time (s. 136).

Special provisions apply to mining companies (Part XI) and to companies operating public utilities (Part XII).

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PART I.

INCORPORATION, RE-INCORPORATION, AMALGAMATION.

What corporations may be incorporated by letters patent.

3. The Lieutenant-Governor may, by Letters Patent, grant a charter to any number of persons, not less than five, of the age of twenty-one years, who petition therefor, constituting such persons and any others who have become subscribers to the memorandum of agreement hereinafter mentioned and persons who thereafter become shareholders or members in the corporation thereby created a corporation for any of the purposes to which the authority of this legislature extends, except those of railway and incline railway and street railway companies, insurance corporations within the meaning of *The Ontario Insurance Act*, and corporations within the meaning of *The Loan and Trust Corporations Act*. 2 Geo. V. c. 31, s. 3.

Exceptions.

Rev. Stat. cc. 183, 184.

See Dominion Act, s. 5.

Powers of Provincial Secretary.

4. The Provincial Secretary may, under the seal of his office, have, use, exercise and enjoy any power, right or authority conferred by this Act on the Lieutenant-Governor but not those conferred on the Lieutenant-Governor in Council. 2 Geo. V. c 31, s. 4.

5. Subject matter:—

(1) Incorporation with share capital.
(2) Contents of petition.
(3) Memorandum of Agreement.
(4) Petitioners to be *bona fide* holders of shares.
(5) Prayer for insertion of special clauses.

See Dominion Act, ss. 7, 8 and 9.

The following are the Departmental instructions:—

Incorporation of Companies with Share Capital.

Departmental instructions.

1. The application for Letters Patent must be by a formal petition, duly executed, with at least two signatures on the page containing the prayer.

2. There must be at least FIVE PETITIONERS.

3. There must be a memorandum of agreement, in duplicate, duly executed under seal by at least the five petitioners with, at least, two signatures on the page or sheet containing the undertaking.

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Departmental instructions.

An agreement made up of two sheets of paper, the one setting forth the undertaking itself, and the other carrying all the signatures by themselves, will not be accepted.

Such agreement should conform, in its essential features, to the form contained in the schedule to The Ontario Companies Act.

4. The petition, which may be submitted at any time without *Gazette* notice, must state:

(*a*) The proposed name of the company.

Such proposed name must not contain the words "Loan," "Mortgage," "Trust" "Investment" or "Guarantee" in combination or connection with any of the words "Corporation," "Company," "Association" or "Society" or in combination or connection with any similar collective term, nor the word "Imperial" or other title signifying Royal or Government support or patronage, such as "Crown" "King's" "Queen's," etc., unless there is some real Imperial Crown connection which gives a well-founded claim to recognition, and unless it can be shown on clear evidence that there is a long and bona fide user, and that the name is so used as not to convey any suggestion of Government support or patronage.

It is the policy of the Department not to grant names of which the words "Merger" "Amalgamated," "Extension," etc., form a part, unless sufficient evidence is filed to show that the undertaking of the proposed company is a bona fide merger, amalgamation or extension or as the case may be.

Evidence must be filed that the name is not objectionable upon any public ground and is not that of any known corporation or association incorporated or unincorporated, or of any partnership or of any individual, or any name under which any known business is being carried on, or so nearly resembling the same as to be calculated to deceive;

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Departmental instructions for incorporation with share capital.

If the proposed corporate name is that of an existing firm or partnership whose undertaking is to be taken over by the company a consent to the use of the name, signed by all the members of the firm or partnership, with the execution thereof verified by the affidavit or statutory declaration of a subscribing witness, and an affidavit or declaration that the signatories comprise all the members of the firm or partnership, should be filed.

If the proposed corporate name is that of an incorporated company, a by-law of the directors of such company authorizing the application and undertaking that no further business operations will be carried on by the company, and that the Letters Patent of the existing company will be surrendered forthwith, must be filed.

If the name of the proposed company includes that of an individual, a verified consent of that individual should accompany the application.

(*b*) The objects for which the company is to be incorporated:

Sections 23 and 24 of the Ontario Companies Act provide wide incidental and ancillary powers. These have been drawn without change from Palmer's Precedents and have been made as wide as possible for the purpose of avoiding repeating them in the Letters Patent, such clauses, therefore, should not be repeated in an application for Letters Patent, nor should variations of them be inserted. There is, however, no objection to other clauses which are not provided and the insertion of which may be required.

The objects of a mining company to which by its Letters Patent Part XI of the Act is made applicable (that is to say, companies "Without Personal Liability") will be expressed in set terms, a copy of which will be supplied on request.

(*c*) The place within Ontario where the head office of the company is to be situate.

If the head office of the company is to be situate in a township or district the post office address of company should also be given.

(*d*) The amount of the capital of the company, the number of shares and the amount of each share.

(*e*) The name in full, the place of residence and the calling of each of the applicants.

The word "Clerk" must not be used except to describe a clerk in Holy Orders, the Department of the Honourable the Attorney-General having ruled that the word may be used for this purpose only.

(*f*) The names of the applicants, not less than three, who are to be the provisional directors of the company.

(*g*) The number of shares for which each applicant has subscribed in the Memorandum of Agreement and Stock Book.

(*h*) That no public or private interest will be prejudicially affected by the incorporation, if such be the fact.

5. If the applicants desire the insertion of special clauses in the Letters Patent, such special clauses must be set out in the petition.

6. If the applicants desire that Part XI of The Ontario Companies Act be made applicable to a mining company, the necessary words to that effect must be added to the prayer of their petition.

7. Special conditions regarding preference shares or otherwise intended to have a bearing upon the shares of the company, or the manner in which they, or any portion thereof, shall or may be subscribed for, must be inserted in the petition and in the Memorandum of Agreement and Stock Book, as material parts thereof.

8. If the applicants desire that the company shall be incorporated as a Private Company, the conditions governing the restriction of the transfer of shares must be inserted in the petition and in the Memorandum of Agreement and Stock Book. It will, however, be sufficient if the Memorandum of Agreement and Stock

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Book indicates that the company is to be incorporated as a Private Company by inserting the word "Private" before the word "company" without setting out the special conditions therein.

Departmental instructions for incorporation with share capital.

9. The facts in the petition contained must be verified by affidavit to be made by one of the applicants. Such affidavit should also state that each petitioner signing the petition is of the full age of twenty-one.

10. Signatures to the Memorandum of Agreement and Stock Books and petition must be verified by statutory declaration or affidavit of subscribing witness or witnesses.

11. Signatures should be the ordinary business signatures of the applicants and must be witnessed and proved by persons who are not petitioners or directly interested in the formation of the company.

12. Signatures by attorney must be made under a specific and general power, duly executed and verified.

13. Application forms can be obtained upon application to the Department of the Honourable the Provincial Secretary.

Public Utility Companies.

Companies coming within the application of Part XII of The Ontario Companies Act are required to file, in addition to the foregoing, the following material:

(*a*) Evidence that the proposed capital is sufficient to carry out the objects for which the company is to be incorporated; that such capital has been subscribed or underwritten and that the applicants are likely to command public trust and confidence in the undertaking;

Such evidence should be in the form of an affidavit or statutory declaration.

(*b*) A detailed description of the plant, works and intended operations of the company, and an estimate of their cost.

This description should be duly verified and in the case of telephone companies should state the number of instruments and poles, miles of wire, etc.

A rough sketch showing the proposed operation of the company should also be submitted.

(*c*) A copy of the by-laws of every municipality in which the company proposes to operate, duly certified by the Clerk of the Municipality under the corporate seal.

(*d*) If the undertaking is to be carried on, or in so far as it is to be carried on, in territory without municipal organization, a report from the Minister of Lands, Forests and Mines approving of the undertaking.

(*e*) If it is proposed that the company shall acquire any plant, works, undertaking, good-will, contract or other property or assets, a detailed statement of the nature and value thereof.

This statement should be duly verified.

Telephone companies.

Telephone Companies must also submit evidence that the municipal by-laws have been approved by the Ontario Railway and Municipal Board.

Powers of a telephone company are expressed in set terms, a copy of which will be supplied on request.

It is suggested that the par value of the shares of a telephone company be fixed at a small amount, *i.e.*, $5 or $10, as The Ontario Telephone Act reads that every member or partner of a company, association or partnership which is afterwards incorporated under the Ontario Companies Act shall have allotted to him shares in the new corporation to the value of his share or interest in the company, association or partnership at the date upon which the charter of incorporation is granted. If the interests of the different members of the association vary it might not be possible to observe this provision if the par value is fixed at a large amount.

Co-operative Companies.

Where a company desires to be incorporated under the provisions of Part XI*a* of the Ontario Companies Act, the word "co-operative" must form part of the

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name and in addition to the material required in an application for the incorporation of a company, as set out herein, it will be necessary to submit the proposed general by-laws of the corporation to conform to the provisions of Part XI*a* of the Act. The Letters Patent of a co-operative company will contain a stereotype form of provisions, a copy of which will be supplied on request.

6. Subject matter:—

(1) Incorporation without share capital.
(2) Contents of petition.
(3) Memorandum of Agreement.
(4) Form of.

See Dominion Act, s. 7A, which only applies to associations with the objects specified.

The following are the Departmental instructions:

Incorporation without Share Capital.

Departmental instructions.

1. The application for Letters Patent must be by a formal petition, duly executed, with at least two signatures on the page containing the prayer.

2. There must be at least FIVE PETITIONERS.

3. The petition, which may be submitted at any time without *Gazette* notice, must state:

(*a*) The proposed name of the corporation.

Evidence must be filed that the name is not objectionable upon any public ground and is not that of any known corporation or association incorporated or unincorporated, or of any partnership or of any individual, or any name under which any known business is being carried on, or so nearly resembling the same as to be calculated to deceive.

If the proposed corporate name is that of an existing association whose undertaking is to be taken over by the corporation, a consent to the use of the name, signed by all the members of the association, with the execution thereof verified by the affidavit or statutory declaration of a subscribing witness, and an affidavit or declara-

tion that the signatories comprise all the members of the association, should be filed.

If the proposed corporate name is that of an association incorporated under the Ontario Companies Act, a by-law of such association authorizing the application and undertaking that the Letters Patent of the existing association will be surrendered forthwith, must be filed.

If the name of the proposed corporation includes that of an individual, a verified consent of that individual should accompany the application.

(*b*) The objects for which the corporation is to be incorporated.

(*c*) The place within Ontario where the Head Office of the corporation is to be situate.

If the Head Office of the corporation is to be situate in a township or district, the post office address of the corporation should also be given.

(*d*) The name in full, the place of residence and the calling of each of the applicants.

The word "Clerk" must not be used except to describe a clerk in Holy Orders, the Department of the Honourable the Attorney-General having ruled that the word may be used for this purpose only.

(*e*) The names of the first directors of the corporation.

(*f*) That no public or private interest will be prejudicially affected by the incorporation, if such be the case.

(*g*) That the corporation will be carried on without the purpose of gain for its members, and that any profits or other accretions to the corporation will be used in promoting its objects.

4. The facts in the petition contained must be verified by affidavit to be made by one of the applicants. Such affidavit should also state that each petitioner signing the petition is of the full age of twenty-one.

5. The petition shall be accompanied by a memorandum of agreement, in triplicate, signed by the peti-

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tioners setting out such regulations as may be deemed expedient for:

Departmental instructions for incorporation without share capital.

(*a*) The election of members, trustees, directors and officers;

(*b*) The holding of meetings of members, trustees and directors;

(*c*) The establishment of branches;

(*d*) The payment of directors, trustees, officers and employees, and

(*e*) The control and management of the affairs of the corporation.

The memorandum shall be expressed in separate paragraphs numbered consecutively, and the applicants may adopt all or any of the provisions of the form contained in the schedule to the Ontario Companies Act, or may substitute others therefor.

There is a short form of memorandum of agreement which provides for constitution by by-law. This is more elastic than a constitution set out in the Letters Patent, which can only be amended by Supplementary Letters Patent. A copy of the short form of memorandum of agreement can be obtained upon request.

6. Signatures to the memorandum of agreement and petition must be verified by statutory declaration or affidavit of subscribing witness or witnesses.

7. Signatures should be the ordinary business signatures of the applicants and must be witnessed and proved by persons who are not petitioners or directly interested in the formation of the company.

8. Application forms can be obtained upon application to the Department of the Honourable the Provincial Secretary.

Effect of regulations in memorandum.

7. In so far as the Letters Patent and Supplementary Letters Patent do not exclude or modify the regulations in Form 4, those regulations shall, so far as practicable, be the regulations of a corporation not having share capital in the same manner and to the same extent as if they were contained in the Letters Patent or Supplementary Letters Patent. 2 Geo. V. c. 31, s. 7; 3-4 Geo. V. c. 18, s. 33 (1).

Change of name or terms of application.

8. The Lieutenant-Governor on an application for Letters Patent or Supplementary Letters Patent may give to the corporation a name different from its proposed or existing name,

as the case may be, and may vary the objects or other provisions or terms stated in the petition or memorandum of agreement. 2 Geo. V. c. 31, s. 8; 3-4 Geo. V. c. 18, s. 33 (2). Sect. 8.

As to change of name see Dominion Act, ss. 12, 21.

The above section also provides that the Lieutenant-Governor may vary the objects or other provisions or terms stated in the petition or memorandum of agreement. The Department frequently refuses to cause letters patent to be issued in the terms of the application where the latter contains objectionable provisions, and in the case of certain corporations, *e.g.*, clubs incorporated under the Act, certain restrictive clauses are invariably inserted in the Letters Patent whether they appear in the application or not.

9. A corporation without share capital heretofore or hereafter incorporated, with the consent in writing of all its members, may by by-law provide for the creation of a capital divided into shares and for the allotment and payment of such shares and may fix and prescribe the rights and privileges of the shareholders; but no such by-law shall take effect until confirmed by Letters Patent or by Supplementary Letters Patent. 2 Geo. V. c. 31, s. 9; 3-4 Geo. V. c. 18, s. 33 (3). Creation of capital of corporation not already having share capital.

See Dominion Act, s. 7A, under which, however, the procedure is different. It should be noted that the consent in writing of all the members is required and that the by-law is ineffective until confirmed by Letters Patent or Supplementary Letters Patent.

10.—(1) Any two or more corporations to which this Act applies having the same or similar objects within the scope of this Act, may, in the manner herein provided, amalgamate and may enter into all contracts and agreements necessary to such amalgamation. 2 Geo. V. c. 31, s. 10 (1). Amalgamation of corporations.

(2) The corporation proposing to amalgamate may enter into a joint agreement for the amalgamation prescribing the terms and conditions thereof, the mode of carrying the same into effect, and stating the name of the new corporation, the names, callings, and places of residence of the first directors thereof, and how and when the subsequent directors shall be elected, with such other details as may be necessary to perfect the amalgamation and to provide for the subsequent management and working of the new corporation, and in cases of companies the number of shares of the capital, the par value of Joint agreement between directors proposing to amalgamate, etc.

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each share, and the manner of converting the share capital of each of the companies into that of the new company. 2 Geo. V. c. 31, s. 10 (2); 3-4 Geo. V. c. 18, s. 33 (4).

Submission to shareholders or members of each corporation.

(3) The agreement shall be submitted to the shareholders or members of each of the corporations at a general meeting thereof called for the purpose of taking the same into consideration.

Consideration of agreement and certificate of adoption.

(4) At such meetings of shareholders or members the agreement shall be considered, and if two-thirds of the votes of all the shareholders or members of each of such corporations are for the adoption of the agreement that fact shall be certified upon the agreement by the secretary of each of such corporations under the corporate seal thereof.

Petition for confirmation by letters patent.

(5) Thereupon the several corporations by their joint petition may apply to the Lieutenant-Governor for Letters Patent confirming the agreement, and on and from the date of the Letters Patent the corporations shall be deemed and taken to be amalgamated and to form one corporation by the name in the Letters Patent provided, and the corporation so incorporated shall possess all the property, rights, privileges and franchises and be subject to all the liabilities, contracts, disabilities and duties of each of the corporations so amalgamated. 2 Geo. V. c. 31, s. 10 (3-5).

There is no corresponding provision in the Dominion Act, Part I.

Amalgamation.

Amalgamation, essentials of.

A perfect amalgamation, or what is intended to be accomplished by such an operation, when thoroughly carried out in all its details, and as regards all the parties concerned, involves the following process:

(1) A transfer of the corporate entity with its franchises, capacities and powers to another corporation.

(2) A transfer of the corporate assets, rights and liabilities present or contingent to such other corporation.

(3) A transmutation of the members of the former corporation into members of the latter.

(4) A novation of the rights of the creditors of the former corporation so that their rights and claims against it are gone and instead the latter corporation is their debtor. Brice, 3rd ed., p. 517.

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But the word "amalgamation" is employed indiscriminately to describe different operations such as

(1) The transfer of all or some parts of the assets and liabilities of one or more than one existing company to another existing company, of which all the members of the transferring company or companies become, or have the right of becoming members.

(2) The transfer of all or some part of the assets and liabilities of two or more existing companies to a new company, of which all the members of the transferring company or companies become, or have the right to become members.

It is only by, or in pursuance of legislative authority that the corporate entity of one corporation can be transferred to and vested in another, or that the members of one corporation can be transmuted into and made members of another, and therefore amalgamation, as meaning or including such results, in the absence of such authority, is impossible; nevertheless the substance of what is desired to be done in such cases can by proper arrangements and proceedings be accomplished indirectly; and it is these operations, with their results, which are now usually meant by the term amalgamation.

An amalgamation in this sense, entails the following proceedings:

Proceedings for amalgamation.

(1) The transfer of the undertaking, assets, rights and liabilities of the one company to another company; it may be one already in existence, or as is more often the case, it may be a new company created for the express purpose of acquiring or taking over the undertaking of the company becoming defunct.

(2) A winding-up for the transferring and distribution of its assets (now represented by cash or frequently shares or debentures of the acquiring company) among the persons entitled in respect of the transferring company.

(3) An indemnity by the acquiring company to the transferring company against its liabilities and obligations.

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Here there is no pretence of any transfer of the corporate entity, although the practical result frequently is very much the same, by reason, amongst other things, that provision is generally made enabling the acquiring company to sue for claims, defend actions, etc., in the name of the transferring company. Nor is there any pretence of a transmutation of the members of the transferring company into members of the acquiring company, although here again very frequently the amalgamation is with a view to this, and provisions are made enabling the shareholders in the old sompany to become shareholders in the new company, and indirectly a considerable amount of pressure is put upon them to induce them to do so. Brice, 3rd ed., p. 518.

Amalgamation May be Effected:

How effected.

(1) By special Act of a Provincial Legislature or of the Parliament of Canada;

(2) Under the provisions of section 10 and similar sections;

(3) Under the winding-up provisions of the Ontario Companies Act, s. 184, and under the corresponding sections of the Voluntary Winding-up Acts obtaining in the other jurisdictions.

Section 184 of the Ontario Companies Act is almost identical with s. 161 of the Imperial Companies Act, 1862. Under it there are two modes of effecting an amalgamation:

(*a*) Company A and Company B desire to amalgamate. Company A passes a special resolution to wind up, appointing a liquidator and directing him to sell the assets to Company B in consideration of shares in that company to be allotted to the members of Company A. The liquidators act accordingly, and Company A is then dissolved.

(*b*) Company A and Company B desire to amalgamate. Company C is formed to acquire their assets and liabilities and to carry on the amalgamated business. Each of the old companies

then passes a special resolution as in the last case, the liquidators carry the sale into effect and the old companies are then dissolved. See Palmer's Company Precedents (1912), Part I. p. 1483.

(4) Under a power in the charter to sell the undertaking for shares in another company combined with a power to divide assets in specie.

(5) Where the number of shareholders is small and they all concur in the proposed amalgamation, such amalgamation may be effected by agreement signed by all shareholders, and by the company providing for the sale of the undertaking for shares in a new company; for the distribution of such shares among the shareholders of the old company; and providing also for the surrender to the new company or to a trustee for it of the shares in the old company.

Usual method.

This last is the method which has hitherto been most usually employed in Canada, and so far as the writers are aware without any serious difficulty having arisen from its employment, though theoretically it is not so exact or accurate as the other methods.

The first step in an amalgamation of this kind is the arrangement of terms upon which the amalgamation is to take place. These must include the nature of the consideration, whether it is to consist of cash or shares, or partly of each, and whether the shares are to be fully or partly paid up. These terms, when agreed on, should be embodied in a conditional agreement.

Notice of the arrangement and the terms agreed upon are then given to the shareholders of the amalgamating companies, and special meetings are called to pass resolutions approving of the agreement and expressly authorizing the directors to execute and carry into effect, the formal agreement. The formal agreements with the purchasing company are then executed and the assets and undertaking of the amalgamating company transferred to the purchasing company.

The notices calling special general meetings of the amalgamating companies to ratify the provisional

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agreements should be made full and explicit. It is also advisable to accompany them with a circular shewing the nature of the arrangement provisionally adopted, and it is sometimes well to add the advantages which will be derived from its adoption, and the reasons which led up to it.

An important question which arises on an amalgamation is whether the debts of the amalgamating company are to be borne by the purchasing company or not.

The purchasing company may not wish to assume obligations which are more or less indefinite, but may prefer to purchase the assets for a fixed sum; on the other hand the shareholders of the amalgamating company are more likely to ratify the arrangement if they have an exact knowledge of how many shares of stock in the new company will be received by their amalgamating company. It is usual, however, for the purchasing company to assume all the liabilities of the amalgamating company.

Decisions.

Decisions.

There are very few reported Canadian decisions on questions arising out of amalgamation. In *Pratt* v. *The Consolidated Electric Co.* (1894) 34 N. B. 23, the defendant Electric Company took over by agreement the property of three other companies subject to certain outstanding bonds. The bonds of the defendant company were issued to retire the bonds of the other companies, and by this means all the outstanding bonds were retired except $26,000 and $6,000 of two of the companies respectively. The holders of these bonds contended that the bonds retired by the defendant company had been paid and cancelled by such retirement, and that these bonds should be paid in full out of the funds in Court; but,

Held, that the redemption of the bonds by the Consolidated Electric Co., by the issue and substitution therefor of bonds of its own did not operate as a payment of the bonds so redeemed, but that the bonds so

redeemed continued to be subsisting securities and entitled to share in the fund in Court proportionately with the bonds not so redeemed, namely, the $26,000 and $6,000 of the Saint John City Railway Company, and of the New Brunswick Electric Company, respectively. Sect. 10.

See also *Re Standard Fire Insurance Company; Kelly's Case*, 12 A. R. 486; *Nelles* v. *Ontario Investment Association*, 17 O. R. 129; *Cayley* v. *Cobourg, etc., R. Co.*, 14 Gr. 571.

The following cases may be referred to on the meaning of "amalgamation": *The Indemnity Case, Albert Arbitration;* Riley, at p. 17; *Stace & Worth's Case*, L. R. 4 Ch. 682; *Era Case*, 32 L. J. Ch. 207; *Wynne's Case*, L. R. 8 Ch. 1002; *Anglo-Austrian* v. *British, etc., Co.*, 3 Giff. 521, 4 De G. F. & J. 341; *G. W. R. Co.* v. *Commers*, [1894] 1 Q. B. 507. Decisions.

As to appointment of directors of selling company to be directors of purchasing company, see *Stace & Worth's Case*, L. R. 4 Ch. 685, and *James* v. *Eve*, L. R. 6 H. L. 385.

As to compensation of officers of selling company: *Southall* v. *British Life Assurance Society*, L. R. 6 Ch. 614.

Notice of meeting must be explicit: *Imperial Bank of China* v. *Bank of Hindustan*, L. R. 6 Eq. 91; *Fox's Case*, L. R. 6 Ch. 176.

Objects of purchasing company may be more extensive than those of selling company: *Southall* v. *British Life Assurance Society*, L. R. 11 Eq. 65.

Invalid agreement: *Clinch* v. *Financial Corporation*, L. R. 4 Ch. 117.

Sale for partly paid up shares valid: *In re City and County Investment Co.*, 13 Ch. D. 475; *Imperial Mercantile Credit Association*, L. R. 12 Eq. 504; *Hester & Company*, 44 L. J. Ch. 757; *Postlethwaite* v. *Port Philip Company*, 43 Ch. D. 452.

Reconstruction.

Closely related to the subject of amalgamation of joint stock companies is the subject of reconstruction Reconstruction.

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Reconstruction.

Reconstruction differs from amalgamation in that it relates only to one single company, whereas amalgamation involves more than one company. Speaking generally the reconstruction of a company may become desirable or necessary in order that it may have conferred upon it other or wider powers either for the carrying on of its business or for the issue of preference shares or bonds or for the purpose of reducing its capital; or for the purpose of obtaining additional funds for the carrying on of its business.

The method of reconstruction is by the formation or organization of a new company and a transfer to it of the undertaking of the old company. This is to be carried out substantially in the same way and may be carried out by the various methods indicated in connection with amalgamation of companies.

For forms and suggestions with respect to reconstruction, the reader is referred to Palmer's Company Precedents, 12th ed., Part I, pp. 1431 ff.

The following are the Departmental instructions for amalgamation:

Amalgamation.

Departmental instructions.

1. Any two or more corporations to which this Act applies having the same or similar objects within the scope of the Ontario Companies Act may amalgamate and may enter into all contracts and agreements necessary to such amalgamation.

2. The application for Letters Patent confirming a joint agreement for the amalgamation of two or more corporations must be by a formal petition of the corporations proposing to amalgamate, duly executed.

3. The petition must state:

(*a*) The name of each of the petitioners in each case, giving the date of incorporation, the amount of capital, the number of shares and the amount of each share.

(*b*) That each of the said petitioners is a subsisting company and carrying on business for the purpose for which it was organized.

(*c*) That an agreement was entered into by the said petitioners, providing for the amalgamation. Sect. 10.

The date of such agreement should be given.

(*d*) The objects of the new corporation.

(*e*) The proposed name of the new corporation.

Evidence must be filed that the name is not objectionable upon any public ground and is not that of any known corporation or association, incorporated or unincorporated, or of any partnership or of any individual, or any name under which any known business is being carried on, or so nearly resembling the same as to be calculated to deceive.

(*f*) The amount of capital of the new corporation, the number of shares and the amount of each share.

(*g*) The place within Ontario where the head office of the corporation is to be situate.

If the head office of the corporation is to be situate in a township or district the post office address of the corporation should also be given.

(*h*) The name *in full*, the place of residence and the calling of each of the first directors of the new corporation.

The word "clerk" must not be used except to describe a clerk in holy orders, the Department of the Honourable the Attorney-General having ruled that the word may be used for this purpose only.

(*i*) That no public or private interest will be prejudicially affected by the amalgamation of the petitioners.

4. If the petitioners desire the insertion of special clauses in the Letters Patent such special clauses must be set out in the petition.

5. The petition should be dated and signed by the executive officers of each of the petitioners, under their corporate seals.

6. The signatures to the petition and the impression of the seals must be verified by affidavit or statu-

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tory declaration of the subscribing witness or witnesses.

Departmental instructions for amalgamation.

7. The allegations in the petition contained should be verified by affidavit or statutory declaration of the executive officers of each of the petitioners.

8. With the petition the following should be filed:

(*a*) Duplicate original agreement entered into. Such agreement should prescribe the terms and conditions of the amalgamation, the mode of carrying the same into effect, and state the name of the new corporation, the names, callings and places of residence of the first directors thereof and how and when the subsequent directors shall be elected, with such other details as may be necessary to perfect the amalgamation and to provide for the subsequent management and working of the new corporation, and in cases of companies the number of shares of the capital, the par value of each share and the manner of converting the share capital of each of the companies into that of the new company.

The fact that two-thirds of the votes of all the shareholders or members of each of the petitioners are for the adoption of the agreement should be certified upon the agreement by the secretary of each of the petitioners under the corporate seal thereof.

(*b*) A statutory declaration or affidavit of the secretary of each of the petitioners that the agreement providing for the amalgamation has been lawfully passed by the directors and confirmed by a vote of the shareholders, present or represented by proxy at a general meeting duly called for considering the same by notice specifying the terms of the agreement to be confirmed and holding not less than two-thirds of the issued capital stock represented at such meeting, or, in the case of a corporation not having share capital, by a vote of two-thirds of the members so present or represented, as the case may be.

(*c*) A certified copy of the proceedings at the meeting of shareholders or members of each of the petitioners with respect to the sanction of the agreement. Sect. 10.

(*d*) A certified extract from the general by-laws of each of the petitioners as to the calling of such meeting of shareholders or members.

(*e*) A certified copy of the notice mailed or copy of advertisement in the *Ontario Gazette* or the local paper of the holding of such shareholders' or members' meeting in each case.

11. Subject matter:—
Re-incorporation of corporation.

See Dominion Act, s. 14.
See *Smith* v. *Humbervale Cemetery Co.* (1915), 33 O. L. R. 452.

12. Subject matter:—
Extension of powers on re-incorporation.

See Dominion Act, s. 15.

13. Subject matter:—
Rights of creditors preserved.

See Dominion Act, s. 14, sub-sec. 4.
See *Smith* v. *Humbervale Cemetery Co.* (1915), 33 O. L. R. 452.

14. Subject matter:—
Conversion of private company into a public company—
(*a*) Resolution therefor;
(*b*) Filing statement, etc.

See Dominion Act, s. 43C (4).

Distribution of assets on ceasing to carry on business.

Distribution of assets among different classes of shareholders.

15.—(1) Where a corporation has ceased to carry on business except for the purpose of winding up its affairs and has no debts or obligations that have not been provided for or protected, the directors may pass by-laws for distributing the assets of the corporation or any part of them among the shareholders. And in any case where the corporation has issued both preference and common shares, such by-laws may provide for distributing any part of the assets, in specie or otherwise, rateably among the holders of preference shares, and the remainder of such assets rateably among the holders of common shares.

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Conditions.

(2) The by-law shall not take effect unless or until it is confirmed by a two-thirds vote of the shareholders present, in person or by proxy, at a general meeting duly called for considering the same and by the Lieutenant-Governor in Council. 2 Geo. V. c. 31, s. 15.

Confirmation of by-law for distribution.

(3) When so confirmed any such by-law shall be valid and binding upon all shareholders of the corporation.

The above section was considered in *Crawford* v. *Bathurst Land, &c., Co.* (1916), 37 O. L. R. 611; (1918) 42 O. L. R. 256.

Supplementary letters patent for certain purposes.

16.—(1) The Directors of a corporation may pass a by-law authorizing an application to the Lieutenant-Governor for the issue of Supplementary Letters Patent providing for—

Varying capital stock.

(*a*) Increasing or decreasing the capital;

See Dominion Act, ss. 52, 53, 54-57.

Re-dividing shares.

(*b*) Re-dividing the capital of the corporation into shares of smaller or larger amount;

See Dominion Act, s. 51.

Varying powers.

(*c*) Limiting the powers of the corporation or extending them to such objects within the scope of this Act as the corporation may desire;

See Dominion Act, s. 34.

Varying borrowing powers.

(*d*) Limiting or increasing the amount which the corporation may borrow upon debentures or otherwise;

Amending charter.

(*e*) Varying any provision contained in the special Act or Letters Patent or Supplementary Letters Patent, where such amount is specified in the Letters Patent or Supplementary Letters Patent of the corporation;

Making other provisions.

(*f*) Any other matter or thing in respect of which provision might have been made had the corporation been incorporated under this Act. 2 Geo. V. c. 31, s. 16 (1).

Confirming by-law.

(2) The application shall not be made until the by-law has been confirmed, in the case of a company, by a vote of the shareholders present or represented by proxy, at a general meeting duly called for considering the same, and holding not less than two-thirds of the issued capital stock represented at such meeting or, in the case of a corporation not having share capital, by a vote of two-thirds of the members so present or represented as the case may be. 2 Geo. V. c. 31, s. 16 (2); 3-4 Geo. V. c. 18, s. 33 (6).

See Dominion Act, s. 34.

(3) The capital shall not be increased until ninety per centum of the authorized capital has been subscribed and fifty per centum paid thereon. Sect. 16. Increase of capital.

See Dominion Act, s. 52.

(4) On a reduction of the capital of a company the liability of shareholders to persons who at the time of such reduction are creditors shall remain as though the reduction had not been made. 2 Geo. V. c. 31, s. 16 (3-4). Rights of creditors preserved.

See Dominion Act, s. 54 D.

The following instructions are issued by the Department authorizing the procedure for obtaining supplementary letters patent.

Supplementary Letters Patent.

1. Supplementary Letters Patent may be issued for the following purposes: Departmental instructions.

(*a*) Increasing or decreasing the capital:

The capital shall not be increased until ninety per centum of the authorized capital has been subscribed and fifty per centum paid thereon. On a reduction of the capital of a company the liability of shareholders to persons who at the time of such reduction are creditors shall remain as though the reduction had not been made.

(*b*) Re-dividing the capital of the corporation into shares of smaller or larger amount;

(*c*) Limiting the powers of the corporation or extending them to such objects within the scope of this Act as the corporation may desire;

(*d*) Limiting or increasing the amount which the corporation may borrow upon debentures or otherwise;

(*e*) Varying any provisions contained in the special Act or Letters Patent or Supplementary Letters Patent, where such amount is specified in the Letters Patent or Supplementary Letters Patent of the corporation; and

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(*f*) Any other matter or thing in respect of which provision might have been made had the corporation been incorporated under this Act.

Departmental instructions for obtaining supplementary letters patent.

2. Each application must be by a formal petition of the corporation, signed by the executive officers of the corporation and passed under its common seal.

3. The petition must set forth the corporate name, the date of incorporation, the nominal capital of the company and other material facts, and show that the corporation is not in arrears in making its annual returns, and

(*a*) *If it be in respect of the increase of the capital* of the company the petition must make it clear:

(1) That at least ninety per centum of the capital of the company has been subscribed and fifty per centum paid thereon;

(2) That the capital of the company is insufficient for the purposes of the company;

(3) That the proposed increase is considered by the company to be requisite for the due carrying out of its undertaking, and

(4) The par value of the new shares must be the same as that of the old shares, unless the old shares are being expressly and at the same time re-divided; or

(*b*) *If it be in respect of a reduction of capital* the petition must show that the reduced amount is sufficient for the due carrying out of the undertaking of the company and advisable, and the *bona fide* character of the decrease of capital thereby provided for; or

(*c*) *If it be in respect of re-division of the existing shares* the petition must explain the reason why such re-division is, in the opinion of the company, necessary and desirable; or

(*d*) If the Supplementary Letters Patent be for other purposes than above referred to, the

necessity therefor must be set out in the petition. Sect. 16.

4. The facts in the petition contained and the *bona fide* character of the increase, decrease or sub-division must be verified by joint affidavit or statutory declaration of the President and Secretary of the corporation.

5. The signatures to the petition and the impression of the seal must be verified by affidavit or statutory declaration.

6. With the petition the corporation must produce the following:

(*a*) A statutory declaration proving that the by-law providing for the increase, decrease, sub-division, etc., has been lawfully passed by the directors and confirmed by a vote of the shareholders present or represented by proxy at a general meeting duly called for considering the same by notice specifying the terms of the by-law to be confirmed, and holding not less than two-thirds of the issued capital stock represented at such meeting; or, in the case of a corporation not having share capital, by a vote of two-thirds of the members so present or represented, as the case may be.

(*b*) A copy of such by-law, duly certified as such under the seal of the corporation;

(*c*) A certified copy of the proceedings at the meeting of shareholders or members with respect to the passage and sanction of the by-law;

(*d*) A certified extract from the general by-laws of the corporation as to the calling of the meeting of shareholders or members, and

(*e*) A certified copy of the notice mailed or copy of advertisement in the *Ontario Gazette* or local paper of the holding of such shareholders' or members' meeting; or

(*a*) A statutory declaration proving that such by-law has been confirmed by the consent in

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writing of all the shareholders or members of the corporation, and

(*b*) A copy of such by-law, duly certified as such under the seal of the corporation.

17. Subject matter:—
Sufficiency of material to be established.

See Dominion Act, s. 36, ss. 54-57.

Proofs of matters under this Act.

18. The Provincial Secretary, or any officer to whom the application may be referred, may take evidence under oath. 2 Geo. V. c. 31, s. 18.

Conditions may be imposed in letters patent.

19. The Letters Patent or Supplementary Letters Patent may impose any conditions with respect to the by-laws of a corporation or any amendments thereof, and in such event the corporation shall not carry on its undertaking, or any part thereof, nor shall the by-laws be of any force or validity until the conditions so imposed are complied with. 2 Geo. V. c. 31, s. 19.

Providing for appointment of auditor.

20. The Letters Patent or Supplementary Letters Patent may authorize the Provincial Secretary whenever he sees fit to appoint an auditor to examine the books of the corporation or an inspector to inspect its undertaking and affairs, or to call a general meeting of its shareholders or members, upon such terms as may be therein set out. 2 Geo. V. c. 31, s. 20.

Notice of issuing letters patent.

21. Notice of the granting of Letters Patent or Supplementary Letters Patent shall be given forthwith by the Provincial Secretary in the *Ontario Gazette*. 2 Geo. V. c. 31, s. 21.

Commencement of existence.

22. A corporation shall be deemed to be existing from the date of the Letters Patent incorporating the same. 2 Geo. V. c. 31, s. 22.

See Dominion Act, s. 13.

A company may be an existing legal entity, though with unused powers, even though no steps have been taken to organize it subsequent to the issuing of the charter: *Campbell* v. *Taxicabs* (1913), 27 O. L. R. 141.

23. Subject matter:—
(1) (*a*) to (*q*). Powers incidental to company.
(2) Powers may be withheld.

24. Subject matter:—
(1) Incidental powers—
(*a*) Buildings, etc.;

(*b*) Real estate;
(2) Incorporation subject to trusts.

Section 23 sets out in the lettered paragraphs a number of incidental powers which are declared to be incidental or ancillary to the powers set out in the letters patent. The wording of the paragraphs of the section appears to have been taken without substantial change from the forms found in Palmer's Precedents, Part 1.

For a discussion of incidental powers see the notes to sections 7-10 and 29 of the Dominion Act.

While the ancillary powers conferred by the Act are generous and usually sufficient, it may occasionally be found convenient or necessary to supplement them by express clauses in the application for incorporation.

The following afford suggestions:—

Clauses conferring powers.

'Subject to section 94 of Ontario Corporations Act to underwrite, subscribe for, purchase or otherwise acquire and hold, either as principal or agent, and absolutely as owner or by way of collateral security or otherwise, and to sell, exchange, transfer, assign or otherwise dispose of or deal in the bonds or debentures, stocks, shares or other securities of any government or municipal or school corporation, or of any chartered bank or of any other duly incorporated company or companies.'

'To distribute the whole or any part of the property or assets of the company in specie or money among its shareholders; provided, however, that no such distribution shall effect a reduction of the capital of the company except made in accordance with the provisions of the Ontario Companies Act.'

'To invest and deal with the moneys of the company not immediately required in such manner as from time to time may be determined.'

'To pay all costs, charges and expenses incurred or sustained in or about the promotion and establishment of the company, or which the company shall consider to be preliminary.'

'Upon any issue of shares, debentures, or other securities of the company to employ brokers, commis-

Secs. 23-24.

Clauses conferring powers.

sion agents and underwriters, and to provide for the remuneration of such persons for their services by payment in cash, or with the approval of the shareholders, by the issue of shares, debentures or other securities of the Company, or by the granting of options to take the same or in any other manner; also to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares, bonds, debentures, debenture stock or other securities of the company; provided, that as regards shares, such commission shall not exceed twenty-five per cent. of the amount realized therefrom.'

'With power to hold meetings of shareholders, directors and executive committee of directors (if any), at any place other than the head office of the company, and whether within or without Ontario.'

In addition if the power to issue share warrants is desired, an appropriate provision should be inserted in the petition. See section 63. Similarly if it is desired to fix the quorum of the directors at less than a majority of the board.

In the case of a mining company desiring to issue its shares at a discount, the petition must ask to have Part XI made applicable.

Payment of property acquired in shares.

25. The directors if authorized so to do by a vote of shareholders present or represented by proxy at a general meeting duly called for considering the matter and holding not less than two-thirds of the issued capital stock represented at the meeting may pay for any property acquired or taken over or purchased under the provisions of clause (*b*) or clause (*i*) of sub-section 1 of section 23 or clause (*b*) of section 24 wholly or partly in shares fully or partly paid up. 2 Geo. V. c. 31, s. 25; 3-4 Geo. V. c. 18, s. 33 (8).

Restrictions as to holding real estate.

26.—(1) Unless other special statutory enactments apply, any land or interest therein at any time acquired by the corporation and not required for its actual use and occupation or for the purposes of its business, or not held by way of security, shall not be held by the Corporation, or by any trustee on its behalf, for a longer period than seven years after the acquisition thereof, or after it has ceased to be required for its actual use and occupation or for the purposes of its business, but shall

be absolutely sold and disposed of, so that the corporation shall no longer retain any interest therein unless by way of security.

Forfeiture of.

(2) Any such land or interest therein not within the exceptions hereinbefore mentioned, held by the corporation for a longer period than seven years without being disposed of shall be forfeited to His Majesty for the use of Ontario.

Extension of time for holding.

(3) The Lieutenant-Governor in Council may extend such period from time to time, not exceeding in the whole twelve years, and no such forfeiture shall take effect or be enforced until the expiration of at least six months after notice in writing to the corporation of the intention of His Majesy to claim the same, and during such six months the corporation may dispose of the land or its interest therein.

Statement to be furnished to Provincial Secretary.

(4) The corporation shall give to the Provincial Secretary when required a full and correct statement of all lands or interests therein at the date of such statement held by or in trust for the corporation. 2 Geo. V. c. 31, s. 26.

27. Subject matter:—

Defects of form not to invalidate letters patent, etc.

See Dominion Act, s. 4.

28. Subject matter:—

(1) Forfeiture of charter for non-user.

(2) Proof of user.

(3) Rights of creditors not affected.

See Dominion Act, s. 27.

Clubs not to be exempted from municipal by-laws as to billiard tables, etc.

Rev. Stat. c. 192.

28*a*. Where a municipal corporation has passed or may hereafter pass a by-law to license, regulate and govern persons or proprietary clubs as provided by paragraph 1 of section 420 of *The Municipal Act*, no charter heretofore or hereafter granted whether by special Act or letters patent or otherwise for any of the purposes mentioned in that paragraph shall be construed as exempting the holders thereof from compliance with the provisions of such by-law or as affecting the discretionary power to refuse or grant a license conferred by subsection 4 of section 253 of *The Municipal Act*.

Revocation of charter.

29. The Letters Patent by which a corporation is incorporated and any Supplementary Letters Patent amending or varying the same may, at any time, be declared to be forfeited and may be revoked and made void by the Lieutenant-Governor in Council, on sufficient cause being shown, upon such conditions and subject to such provisions as he may deem proper. 2 Geo V. c. 31, s. 29.

See the notes to Dominion Act, s. 27.

Sect. 30.

Corporation with less than five members exercising corporate powers, shareholders personally liable.

30.—(1) If a corporation exercises its corporate powers when the number of its shareholders or members is less than five, for a period of more than six months after the number has been so reduced, every person who is a shareholder or member of the corporation during the time that it so exercised its corporate powers after such period of six months and is cognizant of the fact that it so exercises its corporate powers, shall be severally liable for the payment of the whole of the debts of the corporation contracted during such time, and may be sued for the same without the joinder in the action of the corporation or of any other shareholder or member.

Shareholder by protest may relieve himself from liability.

(2) A shareholder or member who has become aware that the corporation is so exercising its corporate powers may serve a protest in writing on the corporation and may by registered letter notify the Provincial Secretary of such protest having been served and of the facts upon which it is based, and such shareholder or member may thereby and not otherwise, from the date of his protest and notification, exonerate himself from liability.

Revocation of charter, if number of shareholders not brought up to five.

(3) If, after notice from the Provincial Secretary, the corporation refuses or neglects to bring the number of its shareholders or members up to five, such refusal or neglect may, upon the report of the Provincial Secretary, be regarded by the Lieutenant-Governor in Council as sufficient cause for the revocation of the charter of the corporation. 2 Geo. V. c. 31, s. 30.

Surrender of charter.

31.—(1) The charter of a corporation incorporated by Letters Patent may be surrendered if the corporation proves to the satisfaction of the Lieutenant-Governor:—

(*a*) That it has no debts or obligations; or

(*b*) That it has parted with its property, divided its assets rateably amongst its shareholders or members and has no debts or liabilities, or,

(*c*) That the debts and obligations of the corporation have been duly provided for or protected or that the creditors of the corporation or other persons holding them consent; and

(*d*) That the corporation has given notice of the application for leave to surrender by publishing the same once in the *Ontario Gazette* and once in a newspaper published at or as near as may be to the place where the corporation has its head office.

Acceptance of surrender and dissolution of corporation.

(2) The Lieutenant-Governor, upon a due compliance with the provisions of this section, may accept a surrender of the charter and direct its cancellation, and fix a date upon and from which the corporation shall be dissolved, and the corporation shall thereby and thereupon become dissolved accordingly. 2 Geo. V. c. 31, s. 31.

The following are the Departmental instructions: Sect. 31.

Departmental instructions.

Surrender of Letters Patent.

1. The charter of a corporation incorporated by Letters Patent may be surrendered if the corporation proves to the satisfaction of the Lieutenant-Governor:

(*a*) That it has no debts or obligations; or

(*b*) That it has parted with its property, divided its assets rateably amongst its shareholders or members, and has no debts or liabilities; or

(*c*) That the debts and obligations of the corporation have been duly provided for or protected, or that the creditors of the corporation or other persons holding them consent; and

(*d*) That the corporation has given notice of the application for leave to surrender by publishing the same once in the *Ontario Gazette* and once in a newspaper published at or as near as may be to the place where the corporation has its head office.

2. The application must be by a formal petition of the corporation, signed by the executive officers of the corporation and passed under its common seal.

3. The petition must set forth the corporate name, the date of incorporation and other material facts and should specify clearly the grounds upon which the corporation feels that it is justified in making the application under the provisions above referred to, and show that the corporation is not in arrears in making its annual returns.

4. The facts in the petition contained must be verified by joint affidavit or statutory declaration of the president and secretary of the corporation.

5. The signatures to the petition and the impression of the seal must be verified by affidavit or statutory declaration.

6. With the petition the corporation must produce the following.

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Departmental instructions for obtaining surrender of charter.

(*a*) A statutory declaration proving that the by-law authorizing the application for an order accepting the surrender of the Letters Patent of the corporation has been lawfully passed by the directors and confirmed by a vote of the shareholders, present or represented by proxy at a general meeting duly called for considering the same by notice specifying the terms of the by-law to be confirmed, and holding not less than two-thirds of the issued capital stock represented at such meeting, or, in the case of a corporation not having share capital, by a vote of two-thirds of the members so present or represented as the case may be.

(*b*) A copy of such by-law, duly certified as such under the seal of the corporation;

(*c*) A certified copy of the proceedings at the meeting of shareholders or members with respect to the passage and sanction of the by-law;

(*d*) A certified extract from the general by-laws of the corporation as to the calling of the meeting of shareholders or members;

(*e*) A certified copy of the notice mailed or copy of advertisement in the *Ontario Gazette* or local paper of the holding of such shareholders' or members' meeting;

(*f*) A verified statement of the affairs of the corporation; and

(*g*) The charter of the corporation, in order that it may ultimately have endorsed upon it the fact that its surrender has been accepted by the Lieutenant-Governor, and that it may be officially cancelled and deposited in the office of the Deputy Provincial Registrar.

Termination of existence of corporations not incorporated by letters patent.

32. The corporate existence of a corporation incorporated otherwise than by Letters Patent may be terminated by order of the Lieutenant-Governor upon petition therefor by such corporation under like circumstances, in like manner and with like effect as a corporation incorporated by Letters Patent may surrender its charter. 2 Geo. V. c. 31, s. 32.

Sect. 33.

Regulations by Lieutenant-Governor in Council.

33. The Lieutenant-Governor in Council may make regulations with respect to:—

(*a*) The cases in which notice of application for Letters Patent or Supplementary Letters Patent must be given;

(*b*) The forms of Letters Patent, Supplementary Letters Patent, notices and other instruments and documents relating to applications and other proceedings;

(*c*) The form and manner of the giving of any notice required by this Act;

(*d*) Such other matters as he may deem necessary or expedient for carrying out the objects and provisions of this Act,

and such regulations shall be published in the *Ontario Gazette* and shall be laid before the Assembly forthwith if the Assembly is then in session, and if not then in session within fifteen days after the opening of the next Session. 2 Geo. V. c. 31, s. 33.

See Dominion Act, s. 25.

PART II.

NAME OF CORPORATION.

Use of word "Limited."

34.—(1) The corporate name of every company with share capital shall have the word "Limited" as the last word thereof.

Idem.

(2) Where the company or any director, manager, officer or employee thereof uses the name of the company, the word "Limited" shall appear as the last word thereof.

Saving.

(3) Stamping, writing, printing, or otherwise marking on goods, wares and merchandise of the company, or upon packages containing the same shall not be deemed to be a use of the name within the provisions of this section.

Abbreviation.

(4) Where the word "company," "club," "association" or other equivalent word forms part of the name the word "Limited" may be abbreviated to "Ltd." or "Ld." 2 Geo. V. c. 31, s. 34 (1-4).

Penalty for using word "limited" without authority.

(5) If any person or persons trade or carry on business under any name or title of which "Limited" is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding $10 for every day upon which that name or title has been used. 6 Geo. V. c. 35, s. 3.

See Dominion Act, ss. 33, 114, 115.

Secs. 35-40.

"Private Company" to be on seal and on share certificates.

35. Every private company shall have on its seal the words "Private Company" and upon every share certificate issued by the company there shall be distinctly written or printed the same words. 3-4 Geo. V. c. 18, s. 33 (9).

Penalty.

36. Every company and every director, manager, officer or other employee making default in complying with the provisions of the next preceding two sections shall incur a penalty not exceeding $10 for a first offence and not exceeding $100 for every subsequent similar offence. 2 Geo. V. c. 31, s. 34 (5); 3-4 Geo. V. c. 18, s. 33 (10).

See Dominion Act, s. 114.

Name to be free from objection.

37. The corporate name shall be one which is not objectionable upon any public ground and is not that of any known corporation or association incorporated or unincorporated, or of any partnership or of any individual, or any name under which any known business is being carried on, or so nearly resembling the same as to be calculated to deceive; but a subsisting corporation, association, partnership, individual or person may consent that its or his name, in whole or in part, be granted to a new corporation incorporated for the purpose of acquiring or promoting the objects of such business. 2 Geo. V. c. 31, s. 35.

Proviso.

See Dominion Act, s. 7, which is narrower in its terms.

38. Subject matter:—
(1) When name of one corporation may be given to another.
(2) Idem.
(3) Idem.

See Dominion Act, s. 106 (8).

39. Subject matter:—
Change of name if objectionable.

See Dominion Act, s. 21.

40. Subject matter:—
(1) Change of name on application of corporation.
(2) In case proposed name is objectionable.

See Dominion Act, s. 22.

The following are the Departmental instructions:

Changing Name of a Corporation.

1. Where a corporation is desirous of changing its name the Lieutenant-Governor, upon being satisfied

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Departmental instructions for changing name.

that the corporation is solvent, and that the change desired is not for any improper purpose and is not otherwise objectionable, may change the name of the corporation.

2. The application must be a formal petition of the corporation, signed by the executive officers of the corporation and passed under its common seal.

3. The petition must set forth the corporate name, the date of incorporation and other material facts, and should show:

(*a*) That the corporation is solvent and that the change desired is not for any improper purpose and is not otherwise objectionable, as above set out;

(*b*) That the new name is not objectionable upon any public ground and is not that of any known corporation or association incorporated or unincorporated, or of any partnership, or of any individual, or any name under which any known business is being carried on, or so nearly resembling the same as to be calculated to deceive;

(*c*) That the corporation is not in arrears in making its annual returns.

4. The facts in the petition contained must be verified by joint affidavit or statutory declaration of the President and Secretary of the corporation.

5. The signatures to the petition and the impression of the seal must be verified by affidavit or statutory declaration.

6. With the petition the corporation must produce the following:

(*a*) A statutory declaration proving that the by-law authorizing the application for an Order changing the name of the corporation has been lawfully passed by the directors and confirmed by a vote of the shareholders, present or represented by proxy at a general meeting duly called for considering the same by notice specifying the terms of the

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Departmental instructions for changing name.

by-law to be confirmed, and holding not less than two-thirds of the issued capital stock represented at such meeting, or, in the case of a corporation not having share capital, by a vote of two-thirds of the members so present or represented, as the case may be.

(*b*) A copy of such by-law, duly certified as such under the seal of the corporation;

(*c*) A certified copy of the proceedings at the meeting of shareholders or members with respect to the passage and sanction of the by-law;

(*d*) A certified extract from the general by-laws of the corporation as to the calling of the meeting of shareholders or members;

(*e*) A certified copy of the notice mailed or copy of advertisement in the *Ontario Gazette* or local paper of the holding of such shareholders' or members' meeting; and

(*f*) Evidence of the solvency of the corporation, which must consist of a sworn copy of the last balance sheet or other sufficient statement of the affairs of the corporation, prepared by some responsible person conversant with its business. The statement should with reasonable detail show the nature, character and value of the corporation's assets and character of its liabilities. If more than a month or so has elapsed since the preparation of the statement, the affidavit or statutory declaration verifying its contents must, if such be the case, show that the position of the corporation has not materially changed since the statement was prepared.

Notice of change.

41. Notice of the change of the name of a corporation shall be given by the Provincial Secretary by publication in the *Ontario Gazette*. 2 Geo. V. c. 31, s. 39.

Change not to affect rights or obligations.

42. The alteration of the name of a corporation shall not affect its rights or obligations. 2 Geo. V. c. 31, s. 40.

See Dominion Act, s. 23.

PART III. Sect. 43.

MEETINGS OF COMPANY.

First Meeting of Private Company, or of a Company which is not offering Shares, Debentures or Debenture Stocks to the Public for Subscription.

43.—(1) The provisional directors of a private company or a company which does not offer shares, debentures or debenture stock to the public for subscription shall call a general meeting of the company to be held at a convenient place within six months from the date of the Letters Patent, for the purpose of electing directors, appointing auditors, sanctioning the by-laws of the company, and transacting such other business as may be necessary to enable the company to carry on its undertaking, and shall, at least ten days before the day on which such meeting is to be held, give notice of such meeting by registered letter addressed to each shareholder, setting out in detail the business to be transacted and matters to be considered thereat. First meeting. Notice.

(2) The provisional directors shall report to such meeting. Report at first meeting.

(*a*) The number of shares subscribed;

(*b*) The names of the subscribers;

(*c*) The amount paid thereon;

(*d*) All contracts entered into by or on behalf of the company;

(*e*) The amount of the preliminary expenses, and

(*f*) A financial statement of the affairs of the company signed by the auditors, if any.

(3) If the meeting is not called by the provisional directors as aforesaid any three or more shareholders may call the meeting. 2 Geo. V. c. 31, s. 41; 8 Geo. V. c. 20, s. 28. Shareholders may call.

(*As to statutory meeting of public companies, see section 117.*)

In the opinion of the authors the above section is directory only. The report, unlike the one provided for in s. 117, is not required to be sent out to the shareholders.

GENERAL MEETINGS.

44. In default of other express provision in the Special Act, the Letters Patent, or Supplementary Letters Patent or by-laws of a company, notice of the time and place for holding general meetings of every company, including the statutory meeting and the annual and special meetings, shall be given at least ten days previously thereto by registered letter Notice of meeting.

Sect. 44. to each shareholder at his last known address, and by an advertisement in a newspaper published at or as near as may be to the place where the company has its head office and to the chief place of business of the company if these differ. 2 Geo. V. c. 31, s. 42.

See Dominion Act, s. 88 (*a*).

Annual meeting.

45.—(1) The annual meeting of the shareholders of the company shall be held at such time and place in each year as the Special Act, Letters Patent, Supplementary Letters Patent or by-laws of the company may provide, and in default of any such provision, on the fourth Wednesday in January in every year.

See Dominion Act, s. 105.

Report to be sent shareholders.

(2) The directors shall, at least seven days before the day on which the meeting is held, send by post to every shareholder a report containing

Balance sheet.

(*a*) A balance sheet made up to date not more than three months before such annual meeting;

Abstract of income and expenditure.

(*b*) An abstract of income and expenditure for the financial period ending upon the date of such balance sheet;

Auditor's report.

(*c*) The report of the auditor or auditors;

Further necessary information.

(*d*) Such further information respecting the company's financial position as the Special Act, the letters Patent, Supplementary Letters Patent, or the by-laws of the company may require;

and the directors shall lay such report before the meeting.

See Dominion Act, s. 105 (2). If it is desired the by-laws may provide that the report mentioned in subsection (2) need not be sent to the shareholders (subsec. 4).

Balance sheet to show assets and liabilities.

(3) Every balance sheet shall be drawn up so as to distinguish at least the following classes of assets and liabilities, namely:

(*a*) Cash;

(*b*) Debts owing to the company from its customers;

(*c*) Debts owing to the company from its directors, officers and shareholders;

(*d*) Stock in trade;

(*e*) Expenditures made on account of future business;

(*f*) Land, buildings and plant;

(*g*) Goodwill, franchises, patents and copyrights, trademarks, leases, contracts and licenses;

(*h*) Debts owing by the company secured by mortgage or other lien upon the property of the company;

(i) Debts owing by the company but not secured;
(k) Amount received on common shares;
(l) Amount received on preferred shares;
(m) Indirect and contingent liabilities.

See Dominion Act, s. 105 (3), which requires certain particulars not set out in the above sub-section.

When report need not be sent.

(4) If the by-laws of the company so provide it shall not be necessary to send the report mentioned in sub-section 2 to the shareholders. 2 Geo. V. c. 31, s. 43.

Special general meeting by directors on requisition therefor.

46.—(1) Upon the receipt of a requisition in writing, signed by the holders of not less than one-tenth of the subscribed shares of the company, setting out the objects of the proposed meeting, the directors, or, if there is not a quorum in office, the remaining directors or director shall forthwith convene a special general meeting of the company for the transaction of the business mentioned in the requisition.

See Dominion Act, s. 87.

By shareholders.

(2) If the meeting is not called and held within twenty-one days from the date upon which the requisition was left at the head office of the company any shareholders holding not less than one-tenth in value of the subscribed shares of the company, whether they signed the requisition or not, may themselves convene such special general meeting.

By directors.

(3) The directors may at any time, of their own motion, call a special general meeting of the company for the transaction of any business.

Notice of

(4) Notice of any special general meeting shall state the business which is to be transacted at it. 2 Geo. V. c. 31, s. 44.

Presiding officer.

47. The president shall preside as chairman at every general meeting of the company, and if there is no president or vice-president, or if at any meeting neither of them is present within fifteen minutes after the time appointed for holding the meeting, the shareholders present shall choose one of their number to be chairman. 2 Geo. V. c. 31, s. 45.

Chairman to be elected when necessary.

Adjournment by consent.

48. The chairman may, with the consent of the meeting and subject to such conditions as the meeting may decide, adjourn any meeting from time to time and from place to place. 2 Geo. V. c. 31, s. 46.

Procedure as to resolution.

49.—(1) At any general meeting, unless a poll is demanded, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the minutes of the company, shall be *prima facie* evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

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Taking vote when poll is demanded.

(2) If a poll is demanded it shall be taken in such manner as the by-laws prescribe, and if the by-laws make no provision therefor then as the chairman may direct.

Casting vote.

(3) In the case of an equality of votes at any general meeting the chairman shall be entitled to a second or casting vote. 2 Geo. V. c. 31, s. 47.

See Dominion Act, s. 88.

Votes.

50. Subject to the Special Act, Letters Patent, Supplementary Letters Patent or by-laws, at all meetings of shareholders every shareholder shall be entitled to as many votes as he holds shares in the company, and may vote by proxy, but no shareholder in arrear in respect of any call shall be entitled to vote at any meeting. 2 Geo. V. c. 31, s. 48.

Share-holders in arrear not to vote.

See Dominion Act, s. 88 (*b*).

A person registered without qualification as a holder of shares has the right to vote thereon which the chairman has no power to question. He need not be shown to be the beneficial owner: *Tough Oakes* v. *Foster* (1917), 39 O. L. R. 144.

Proxy.

51.—(1) The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorized in writing, or, if the appointor is a corporation, either under the common seal or under the hand of an officer or attorney so authorized, and shall cease to be valid after the expiration of one year from the date thereof.

Qualification of proxy.

(2) No person shall act as a proxy unless he is entitled on his own behalf to be present and vote at the meeting at which he acts as proxy or has been appointed to act at that meeting as proxy for a corporation.

Not to vote on show of hands.

(3) A proxy for an absent shareholder shall not have the right to vote on a show of hands.

Form of

(4) An instrument appointing a proxy may be according to Form 6 or such other form as may be prescribed by the by-laws of the corporation and shall not contain anything but the appointment of the proxy or a revocation of a former instrument appointing a proxy.

Revocation of.

(5) An instrument appointing a proxy may be revoked at any time. 2 Geo. V. c. 31, s. 49.

Deposit of proxy.

(6) The directors may by by-law prescribe the period of time immediately preceding any special or general meeting of the shareholders within which the instrument appointing the proxy shall be deposited with the company; provided that in no case shall such period of time exceed seventy-two hours immediately preceding the meeting for which such proxy is to be

used or acted upon; and further provided that any period of time so fixed shall be specified in the notice calling the meeting 9 Geo. V. c. 41, s. 2.

See Dominion Act, ss. 88 (*b*), 80 (*c*).

Where meetings to be held.

52. Meetings of the shareholders, directors and executive committees shall be held at the place where the head office of the company is situate except when otherwise provided by the Special Act, Letters Patent, Supplementary Letters Patent or the by-laws of the company, but shall not be held out of Ontario unless when so authorized by the Special Act, Letters Patent or Supplementary Letters Patent. 2 Geo. V. c. 31, s. 50.

See Dominion Act, ss. 105, 88 (*a*).

PART IV.

SHARES, CALLS.

Generally.

Limit of shareholder's holding in certain cases.

53. No shareholder of a co-operative cold storage company or association to which aid has been or may hereafter be granted under the provisions of any statute, or of a cheese and butter manufacturing company carried on on the co-operative plan, shall hold shares to an amount exceeding $1,000. 2 Geo. V. c. 31, s. 51.

Share certificate.

54.—(1) Every shareholder shall, without payment, be entitled to a certificate under the common seal of the company stating the number of shares held by him and the amount paid up thereon, but, in respect of a share or shares held jointly by several persons, the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint shareholders shall be sufficient delivery to all.

See Dominion Act, s. 80 (*a*).

Evidence of title.

(2) The certificate shall be *prima facie* evidence of the title of the shareholder to the shares mentioned in it. 2 Geo. V. c. 31, s. 51 (1-2).

See *Lorsch* v. *Shamrock Consolidated* (1917), 39 O. L. R. 315.

Shares issued in pounds sterling or francs or marks.

(3) Where a company issues shares in pounds sterling, francs or marks, shares previously issued in Canadian currency may, at the option of the holder, be exchanged for shares in pounds sterling, francs or marks. 2 Geo. V. c. 31, s. 52 (3); 3-4 Geo. V. c. 18, s. 33 (12).

Secs. 54-58.

Fixed value of shares so issued.

(4) For the purpose of dividends, distribution of assets, voting and all other matters relating to the amount of shares issued in pounds sterling or francs or marks, one pound sterling or twenty-five francs or twenty marks shall be calculated as five dollars. 2 Geo. V. c. 31, s. 52 (4); 3-4 Geo. V. c. 18, s. 33 (13).

Shares to include share warrants.

(5) Shares shall include share warrants, where the company is authorized to issue the same. 2 Geo. V. c. 31, s. 52 (5).

Lost certificate.

55. If a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding twenty-five cents, and on such terms, if any, as to evidence and indemnity as the directors think fit. 2 Geo. V. c. 31, s. 53.

56. Subject matter:—

(1) Shares personal estate.

Restrictions on transfer.

(2) Subject to section 58, no by-law shall be passed which in any way restricts the right of a holder of paid-up shares to transfer the same, but nothing in this section shall prevent the regulation of the mode of transfer thereof. 2 Geo. V. c. 31, s. 54.

See Dominion Act, ss. 45, 64ff.

57. Subject matter:—

(1) Directors' consent required where shares not paid up.

See Dominion Act, s. 65.

(2) Their liability, if they allow transfers to persons without means.

See Dominion Act, s. 83.

(3) Relief from liability by entering protest.

See Dominion Act, s. 83.

Liability where call remains unpaid.

(4) Where a share upon which a call is unpaid is transferred without the consent of the directors, the transferee shall be liable for the call to the same extent and with the same liability to forfeiture of the shares, if the call remains unpaid, as if he had been the holder when the call was made, and the transferor shall remain also liable for the call until it has been paid. 2 Geo. V. c. 31, s. 55.

Refusal to register transfer where shareholder indebted to corporation.

58. Where the Letters Patent, Supplementary Letters Patent or by-laws of a corporation confer that power on the directors, they may decline to register a transfer of shares belonging to a shareholder who is indebted to the corporation. 2 Geo. V. c. 31, s. 56.

See Dominion Act, s. 67.

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Closing transfer books pending distribution of dividend.

59. The directors, upon the passing of a by-law authorizing the payment of a dividend upon shares, may direct that no entry of transfers shall be made in the books of the company for a period of two weeks immediately preceding the payment of such dividend, and payment thereof shall be made to the shareholders of record on the date of closing such books. 2 Geo. V. c. 31, s. 57.

60. Subject matter:—

Transfer valid only after entry.

See Dominion Act, s. 64.

Transferor may be notified.

61.—(1) The directors may, for the purpose of notifying the person registered therein as owner of such shares, refuse to allow the entry in any such books of a transfer of shares, and in that event shall forthwith give notice to the owner of the application for the entry of the transfer.

Owner may lodge caveat.

(2) Such owner may lodge a caveat against the entry of the transfer and thereupon such transfer shall not be made for a period of forty-eight hours.

Transfer may be entered if no order served.

(3) If, within one week from the giving of such notice or the expiration of the period of forty-eight hours, whichever shall last expire, no order of a competent court enjoining the entry of such transfer shall have been served upon the company the transfer may be entered.

Company not to be liable if section complied with.

(4) Where a transfer is entered after the proceedings mentioned in this section the company shall, in respect of the shares so transferred, be free from liability to a person whose rights are purported to be transferred, but without prejudice to any claim which the transferor may have against the transferee. 2 Geo. V. c. 31, s. 59.

The Dominion Act contains no similar provision.

Calling in instalments.

62.—(1) The directors may call in and demand from the shareholders the amount unpaid on shares by them subscribed or held, at such times and places and in such payments or instalments as the Special Act, the Letters Patent, Supplementary Letters Patent, this Act, or the by-laws of the company require or allow; and interest shall accrue upon the amount of any unpaid call from the day appointed for payment of such call.

Demand to state liability to forfeiture.

(2) The demand shall state that in the event of nonpayment of shares in respect of which the call was made will be liable to be forfeited.

Forfeiture of shares.

(3) If, after the demand, any call is not paid within the time and in the manner provided by the Special Act, the Letters Patent, Supplementary Letters Patent or the by-law the directors, by resolution to that effect reciting the facts and duly recorded

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in their minutes, may summarily forfeit any shares whereon such payment is not made; and the same shall thereupon become the property of the company, and may be disposed of as, by by-law or otherwise, the company may ordain; but such forfeiture shall not relieve the shareholder of any liability to the company or to any creditor. 2 Geo. V. c. 31, s. 60.

See Dominion Act, ss. 58-63.

Share Warrants.

63. Subject matter:—
Issue of share warrants.
See Dominion Act, s. 68A.

64. Subject matter:—
Rights of holders.
See Dominion Act, s. 68A2.

65. Subject matter:—
Surrender of share warrants.
See Dominion Act, 68A3.

How far holders of share warrants to be deemed shareholders.

66. The bearer of a share warrant may, if the Letters Patent or Supplementary Letters Patent so provide, be deemed to be a shareholder of the company, either to the full extent or for such purposes as may be thereby prescribed, but he shall not be qualified, in respect of the shares specified in such warrant, to be a director where the by-laws of the company provide that a director must be the holder of a specified number of shares. 2 Geo. V. c. 31, s. 64.

Restrictions on holders of share warrants.

67. Except as herein otherwise expressly provided no person shall, as a bearer of a share warrant, sign a requisition for calling a meeting of the company, or attend, or vote, or exercise any other privilege of a shareholder at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of shareholders as the holder of the shares included in the warrant, and he shall be a shareholder of the company. 2 Geo. V. c. 31, s. 65.

68. Subject matter:—
Entries on issue of share warrants.
See Dominion Act, s. 68A5.

Compliance with s. 118.

69. Until the warrant is surrendered the above particulars shall be deemed to be the particulars which are required by section 118 to be entered in the register of shareholders; and on the surrender of a warrant the date of such surrender shall

be entered as if it were the date at which a person ceased to be a shareholder. 2 Geo. V. c. 31, s. 67. Sect. 69.

See Dominion Act, s. 68A6.

70.—(1) The bearer of a share warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited the depositor shall have the same right of signing a requisition for calling a meeting of the company and of attending and voting and exercising the other privileges of a shareholder at any meeting, held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of shareholders as the holder of the shares included in the deposited warrant, and the company shall, on two days' written notice, return the deposited share warrant to the depositor. Exercise of privileges on deposit of share warrants.

(2) Not more than one person shall be recognized as depositor of the share warrant. 2 Geo. V. c. 31, s. 68. Conditions.

See Dominion Act, s. 68A7.

71. The directors may make rules as to the terms on which a new share warrant or coupon may be issued in case of the defacement, loss or destruction of the original. 2 Geo. V. c. 31, s. 69. Lost share warrant.

Liability of Shareholders—Execution of Trusts.

72. Subject matter:—
(1) Trusts.
(2) Sufficient discharge.
(3) Application of money paid.

See Dominion Act, s. 50.

73. Subject matter:—
(1) Trustees, etc., and Mortgagor may vote.
Exceptions.

See Dominion Act, s. 42, which differs from the Ontario section by omitting the provision that the person who mortgages or hypothecates his shares loses his right to vote if he has in the document expressly empowered the holder of the mortgage or hypothecation to vote.

(2) Subject to the by-laws, if shares are held jointly by two or more persons any one of them present at a meeting may, in the absence of the other or others, vote thereon, but if more than one of them are present, or represented by proxy, they shall vote together on the shares jointly held. 2 Geo. V. c. 31, s. 71. Joint holders of stock.

See Dominion Act, ss. 88 and 80 (*e*).

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74. Subject matter:—

(1) Liability of shareholders.

See Dominion Act, s. 39.

(2) Set-off.

See Dominion Act, s. 40.

75. Subject matter:—

Shareholders not liable beyond unpaid amount.

See Dominion Act, s. 38.

76. Subject matter:—

(1) Trustees not personally liable.

Liability of beneficiary.

(2) If the trust is for a living person not under disability such person shall also be liable as a shareholder.

Where beneficiary, etc., not named trustee, etc., liable.

(3) If the testator, intestate, ward, lunatic or person so represented is not named in the books of the company the executor, administrator, guardian, committee or trustee shall be personally liable in respect of such shares as if he held them in his own name as owner thereof. 2 Geo. V. c. 31, s. 74.

See Dominion Act, s. 41.

77. Subject matter:—

Person holding shares as collateral security not personally liable prior to foreclosure.

See Dominion Act, s. 41 (2), from which the Ontario section differs by expressly providing that the holder of shares as collateral security is personally liable thereon after foreclosure.

PART V.

PREFERENCE AND DEBENTURE STOCK, DEBENTURES AND MORTGAGES.

78. Subject matter:—

(1) By-laws for—

(*a*) Borrowing money;

(*b*) Issuing securities;

(*c*) Disposing of securities.

Borrowing by-law.

See Dominion Act, s. 69 (1) (a) (c). See also s. 82 (1) of this Act. It is advisable that the general borrowing by-law of the company should be passed in pursuance of and combine the wording of both sections 78

and 82. The by-law may be sanctioned by the consent in writing of all the shareholders in lieu of confirmation at a general meeting: s. 144. Sect. 78.

The exercise of borrowing powers by all public companies, except those which do not offer shares, debentures or debenture stock to the public for subscription, is forbidden until the provisions of section 114 have been complied with.

(2) By-laws for—

(*a*) creating preference shares.

See Dominion Act, s. 47.

(*b*) The conversion of preference shares into common shares or debentures or debenture stock, debentures into debenture stock or preference shares, or any class of shares or securities into any other class. Conversion of preference shares.

By-laws passed under both sub-sections (*a*) and (*b*), in addition to confirmation by the shareholders, by vote of the shareholders under s. 79 or consent in writing under s. 144, may also require confirmation by supplementary letters patent as a pre-requisite to their validity where s. 80 (2) of the Act applies. Section 81 should also be noted, which requires the consent of the holders to redemption or conversion unless such redemption or conversion was a term of the issue.

(3) General powers of borrowing not affected.

See Dominion Act, s. 69 (2).

79. No by-law for any of the purposes mentioned in the next preceding section shall take effect until it has been confirmed by a vote of shareholders present, or represented by proxy and holding not less than two-thirds of the issued capital stock represented at the meeting or by vote of two-thirds of the members so present or represented, as the case may be, at a general meeting duly called for considering the same. 2 Geo. V. c. 31, s. 77. Confirming by-law.

See Dominion Act s. 69 as to confirmation of borrowing by-law, and s. 48 as to confirmation of preference share by-law. Confirmation by consent in writing of all the shareholders or members of the corporation is authorized by s. 144.

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By-law for issue of preference shares.

80.—(1) A by-law for the creation and issue of preference shares or for the conversion of shares, debentures or debenture stock into preference shares may provide that the holders of such shares shall have such preference as regards dividends and repayment on dissolution or winding-up as may be therein set out, and the right to select a stated proportion of the board of directors, or such other control over the affairs of the company as may be considered expedient; or may limit the right of the holders thereof to specific dividends or control of the affairs of the company or otherwise, not contrary to law or to this Act, and may provide for the purchase or redemption of such shares by the company as therein set out; but any term or provision of such by-law, whereby the rights of holders of such shares are limited or restricted, shall be fully set out in the certificate of such shares, and in the event of such limitations and restrictions not being so set out they shall not be deemed to qualify the rights of holders thereof.

See Dominion Act, s. 47.

Restrictions to be set out in certificate.

The provision of the above section to the effect that failure to set out fully in the preference share certificate any term or provision of the by-law whereby the rights of holders are limited or restricted, leads to considerable difficulty. Such terms or provisions are frequently long and elaborate, in which case it is submitted that setting out such terms and provisions in an abbreviated form is a sufficient compliance with the section, provided that the disclosure of the limitations and restrictions in the certificate is complete and unambiguous. Setting out the restrictions on the back of the certificate, if they are referred to on the face, has been held to be a compliance with the section: *Harrison* v. *Marshall* (Meredith, C.J.C.P., March 4th, 1920, unreported).

When confirmation by supplementary letters patent required.

(2) No such by-law which has the effect of increasing or decreasing the capital of the company, or increasing the amount of the preference stock authorized by the special Act, Letters Patent, Supplementary Letters Patent or any prior by-law of the company, or otherwise varying any term or provision thereof, shall be valid or acted upon until confirmed by Supplementary Letters Patent. 2 Geo. V. c. 31, s. 78; 6 Geo. V. c. 35, s. 4.

See Dominion Act, s. 52 (2), as to confirmation of increase of capital by supplementary letters patent, and s. 54 as to similar confirmation of decrease of capital.

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As to the meaning of the words "has the effect of . . . *decreasing* the capital," it is submitted that the by-law does not have such effect until a redemption or purchase of the shares takes place. It is, however, advisable to have a by-law to which the section may apply confirmed by supplementary letters patent as soon as possible.

Consent of holders to redemption.

81. Unless preference shares, debenture stock, debentures or bonds are issued subject to redemption or conversion the same shall not be subject to redemption or conversion without the consent of the holders. 2 Geo. V. c. 31, s. 79.

Mortgages to secure debentures, etc.

82.—(1) The directors may charge, hypothecate, mortgage, or pledge any or all of the real or personal property, including book debts and unpaid calls, rights, powers, undertaking and franchises of the corporation to secure any bonds, debentures, debenture stock, or other securities, or any liability of the corporation.

See Dominion Act, s. 69 (*d*), which is narrower in its terms than the above section.

Duplicate to be filed.

(2) A duplicate original of such charge, mortgage or other instrument of hypothecation or pledge made to secure such bonds, debentures or debenture stock or other securities shall be forthwith filed in the office of the Provincial Secretary as well as registered under the provisions of any other Act in that behalf. 2 Geo. V. c. 31, s. 80.

Registration.

See Dominion Act, s. 69A, and the notes to ss. 69-69M at pages 395-397. There is no penalty for default in filing a duplicate and probably the section is directory only.

Doubtless the words "other securities" are to be read *ejusdem generis*. No express provision is made for filing one of the debentures of a series where there is no covering trust deed.

PART VI.

DIRECTORS AND THEIR POWERS, ETC.

First directors.

83. The persons named as provisional directors in the Special Act or in the Letters Patent shall be the directors of the company until replaced by the same number of others duly

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When election to be held.

elected in their stead by the shareholders in general meeting, which shall be held not later than six months after the coming into force of the Special Act or the date of the Letters Patent, and they shall be eligible for election. 2 Geo. V. c. 31, s. 81; 6 Geo. V. c. 35, s. 5.

See Dominion Act, s. 73.

The above section expressly states what the Dominion section implies, viz., that the provisional directors must be replaced by an equal number of permanent directors. The result of the provision is that stating in the petition the names of the provisional directors, as required by the Act, has the effect of fixing the number of the board, which can thereafter only be changed under s. 90. Furthermore, there must obviously be petitioners equal in number to that of the board of permanent directors proposed to be elected.

84. Subject matter:—
Board of directors.

See Dominion Act, s. 72, and the notes to ss. 72, 74, 77 and 78.

Business must be transacted by quorum of board.

85.—(1) Except as in this section provided no business of a company shall be transacted by its directors unless at a meeting of directors at which a quorum of the board shall be present.

See Dominion Act, s. 80 (*e*).

Majority to constitute quorum.

(2) Unless otherwise provided by the Letters Patent or Supplementary Letters Patent a majority of the directors shall be necessary to constitute a quorum.

See Dominion Act, s. 80 (*e*).

If it is desired that less than a quorum be empowered to act, an appropriate provision should be inserted in the petition for incorporation.

Filling vacancies while there is a quorum.

(3) So long as a quorum of directors remains in office vacancies in the board may be filed by such directors as remain in office.

See Dominion Act, s. 78 (*c*).

Calling meeting when no quorum.

(4) Whenever there is not a quorum of directors in office it shall be the duty of the remaining directors or director forthwith to call a meeting of the shareholders to fill the vacancies, and in default the meeting may be called by any shareholder.

(5) If there are no directors remaining in office a meeting to elect directors may be called by any shareholder. 2 Geo. V. c. 31, s. 83. Calling meeting when no directors.

See Dominion Act, s. 87.

86.—(1) The shareholders of a company having more than six directors may, by a resolution passed by a vote of those present or represented by proxy and holding not less than two-thirds of the issued capital stock represented at a general meeting called for that purpose, authorize the directors to delegate any of their powers to an executive committee, consisting of not less than three, to be elected by the directors from their number. Executive committee.

(2) A committee so formed shall, in the exercise of the powers so delegated, conform to any regulation that may be imposed upon them by such resolution or by the directors. 2 Geo. V. c. 31, s. 84. Committee subject to regulations.

See Dominion Act, s. 80, notes at p. 485. The Act does not specify that the quorum of the executive committee may be fixed. It is, however, submitted that this may be done.

87. Subject matter:—
Qualification of directors.

See Dominion Act, s. 75.

88. Subject matter:—
Election of directors—
(*a*) Yearly.

See Dominion Act, s. 78 (*a*).

(*b*) By ballot.

See Dominion Act, s. 78 (*b*).

(*c*) President, vice-president and officers.

See Dominion Act, s. 78 (*d*).

89. Subject matter:—
Failure to elect directors—how remedied.

See Dominion Act, s. 74.

90. Subject matter:—
(1) Change by by-law of number of quorum of directors or of head office in Ontario.

See Dominion Act, s. 76 as to varying numbers of directors and changes of location of head office. As

Sect. 85. to fixing the quorum of the board, see Dominion Act, s. 80 (*e*). Under the Ontario section there is no power to fix the quorum at less than a majority without the authority of letters patent or supplementary letters patent. See s. 85 (2), *supra*.

Chairman of board of directors.

(1a) A company may by by-law provide for the election of a chairman of the Board of Directors, and define his duties and may assign to the chairman of the Board of Directors any or all of the duties of the president or other officer of the company as prescribed by this Act, and in that case the by-law shall fix and prescribe the duties of the president:

(*a*) When a by-law has been passed under the provisions of this sub-section for the appointment of a chairman of the Board of Directors, this Act so far as it affects the company passing the by-law shall be read as if the chairman of the Board of Directors had been named in the Act instead of the president, so far as the by-law transfers or assigns the duties of the president to the chairman of the Board of Directors. 8 Geo. V. c. 20, s. 29.

(2) Subject matter:—
By-law to be confirmed by shareholders.

See Dominion Act, s. 76.

Publication.

(3) A copy of the by-law certified under the seal of the company shall be forthwith filed in the office of the Provincial Secretary and published in the *Ontario Gazette*; and, in case of the removal of the head office twice in a newspaper published in the place where the head office was located and also twice in a newspaper published in the place to which the head office is to be removed or as near thereto as may be. 2 Geo. V. c. 21, s. 88.

See Dominion Act s. 76.

91. Subject matter:—
(1) By-laws.
(*a*) Shares.

See Dominion Act, s. 80 (*a*).

(*b*) Dividends.

See Dominion Act, s. 80 (*b*).

Directors' services, etc.

(*c*) The amount of the share qualification of the directors and the remuneration of the directors and of the President and Vice-President;

See Dominion Act, s. 80 (*c*).

(*d*) The time at which and place where the meetings of the company shall be held; the calling of meetings of the company; and the procedure in all things at such meetings; and except as provided by section 51 of the requirements as to proxies. Meetings.

See Dominion Act, s. 80 (*d*).

(*e*) The conduct in all other particulars of the affairs of the company. Miscellaneous.

See Dominion Act, s. 80 (*g*).

(2) Subject to the provisions of sub-section 3 every such by-law and every repeal, amendment or re-enactment thereof, unless in the meantime confirmed at a general meeting of the company duly called for that purpose, shall have force only until the next annual meeting of the company; and in default of confirmation thereat shall, at and from that time, cease to have force; and in that case no new by-law to the same or the like effect or re-enactment thereof shall have any force until confirmed at a general meeting of the company. Confirmation of by-laws.

See Dominion Act, s. 81.

(3) The company may, either at a general meeting called for that purpose or at the annual meeting, repeal, amend, vary or otherwise deal with any by-law passed by the directors, but no act done or right acquired under any by-law shall be prejudicially affected by any such repeal, amendment, variation or other dealing. 2 Geo. V. c. 31, s. 89. By-laws may be varied.

See Dominion Act, s. 81.

92. No by-law for the payment of the president or of any director shall be valid or acted upon unless passed at a general meeting, or, if passed by the directors, until the same has been confirmed at a general meeting. 2 Geo. V. c. 31, s. 90. Payments to president or directors.

See the notes to Dominion Act, s. 80, at page 499. With regard to the cases there cited, it should be observed in the above section that the by-law may be passed in the first instance at a general meeting, in which event it does not require confirmation.

In *Re Solicitors* (1913) 27 O. L. R. 147, 158, solicitors were held to be not entitled to be paid by their clients for their services as directors of a company in the incorporation of which they were employed.

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Directors not to vote on contracts in which they have a personal interest, etc.

93.—(1) No director shall at any directors' meeting vote in respect of any contract or arrangement made or proposed to be entered into with the company in which he is interested either as vendor, purchaser or otherwise. 2 Geo. V. c. 31, s. 91 (1); 3-4 Geo. V. c. 18, s. 34 (1).

No liability where interest disclosed and refrains from voting.

(2) A director who may be in any way interested in any contract or arrangement proposed to be made with the company shall disclose the nature of his interest at the meeting of the directors at which such contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest, and if he discloses the nature of his interest, and refrains from voting, he shall not be accountable to the company by reason of the fiduciary relationship existing for any profit realized by such contract or arrangement; but no director shall be deemed to be in any way interested in any contract or arrangement, nor shall he be disqualified from voting or be held liable to account to the company by reason of his holding shares in any other company with which a contract or arrangement is made or contemplated. 2 Geo. V. c. 31, s. 91 (2); 3-4 Geo. V. c. 18, s. 34 (2).

Proviso

(3) This section shall not apply to any contract by or on behalf of a company to give the directors or any of them security by way of indemnity. 2 Geo. V. c. 31, s. 91 (3).

See the notes to Dominion Act, s. 80 at p. 477, and following.

Not to purchase shares of other corporations unless authorized by by-law.

94.—(1) The company although authorized by the Special Act, Letters Patent or Supplementary Letters Patent, or by this Act to purchase shares in any other corporation shall not do so or use any of its funds for such purpose until the directors have been expressly authorized by a by-law passed by them for the purpose, and confirmed by a vote of shareholders present or represented by proxy at a general meeting duly called for that purpose and holding not less than two-thirds of the issued capital stock represented at such meeting. 2 Geo. V. c. 31, s. 92 (1); 3-4 Geo. V. c. 18, s. 33 (14).

Not to apply to company dealing in shares.

(2) This section shall not apply to a company incorporated for the purpose of carrying on the business of buying, selling or dealing in shares. 2 Geo. V. c. 31, s. 92 (2).

See Dominion Act, s. 44. Sub-section (1) of the above section requires the authority of a by-law confirmed by the shareholders notwithstanding any authorization by special act, letters patent or supplementary letters patent. It is submitted that the by-law may be general and need not be a specific authorization to purchase designated shares.

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95. Subject matter:—

(1) Liability of directors declaring a dividend when company is insolvent, etc.

How director may avoid liability.

See Dominion Act, ss. 70 and 82. In the above section the words "diminishes the capital" take the place of the words "impairs the capital" in the Dominion sections.

Case of companies with wasting assets.

(2) Nothing in this section shall prevent a mining company or a company whose assets are of a wasting character from declaring or paying dividends out of its funds derived from the operations of the company.

How far capital may be impaired.

(3) The powers conferred by sub-section 2 may be exercised notwithstanding that the value of the net assets of the company may be thereby reduced to less than the par value of the issued capital stock of the company if the payment of the dividends does not reduce the value of its remaining assets so that they will be insufficient to meet all the liabilities of the company exclusive of its nominal paid-up capital.

Dividends, how payable.

(4) A dividend may be paid by any such company distributing in specie or in kind assets of the company not exceeding in value the amount of the dividend.

Approval of shareholders.

(5) The powers conferred by sub-section 2 shall not be exercised by any such company unless under the authority of a by-law passed by the directors and confirmed at a general meeting duly called for the purpose of considering the same by a vote of the shareholders present or represented by proxy and holding not less than two-thirds of the issued capital stock represented at such meeting.

Validity of payments.

(6) Where dividends have already been paid by such a company in any of the cases mentioned in sub-section 2, the payment thereof shall be deemed valid if a by-law adopting and approving the same is passed by the directors and approved by vote of the shareholders in the manner mentioned in sub-section 5. 3-4 Geo. V. c. 18, s. 33 (15).

Sub-sections (2), (3), (5) and (6) were passed in 1913 as the result of an application by the authors' firm for special legislation on behalf of a mining company. Any dividends paid by such companies arising out of proceeds of the sale of ore would, strictly speaking, diminish the fixed capital. The question of the legality of such dividends apart from such legislation as above set out is discussed in the notes to ss. 70 and following of the Dominion Act. The above section is intended to remove such doubts where a by-law is

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passed and confirmed as above provided. Such a by-law should be passed in the organization stage of any company to which the section may apply.

Stock dividends.

96. For the amount of any dividend which the directors may lawfully declare payable in money, they may, subject to the approval in the following sub-section mentioned, declare a stock dividend and issue therefor shares of the company as fully paid or partly paid, or may credit the amount of such dividend on the shares of the company already issued, but not fully paid, and the liability of the holders of such shares shall be reduced by the amount of such dividend. 2 Geo. V. c. 31, s. 94; 9 Geo. V. c. 41, s. 3.

Stock dividends to have no effect unt'l confirmed by shareholders.

(2) No declaration of stock dividend as aforesaid shall have any effect, unless and until such declaration shall have been confirmed by a vote of the shareholders present or represented by proxy, at a general meeting duly called for considering the same and holding not less than two-thirds of the issued capital stock represented at such meeting. 9 Geo. V. c. 41, s. 3.

For a discussion of stock dividends, see the notes to s. 70 of the Dominion Act at page 419, *supra.*

97. Subject matter:—

No loan by company to shareholders.

See Dominion Act, ss. 29 (2) and 84.

98. Subject matter:—

(1) Liability of directors for wages.

(2) No liability until,

(*a*) Company sued, etc.

Company in liquidation, etc.

(*b*) The company has, within that period, gone into liquidation or has been ordered to be wound up and the claim for such debt has been duly filed and proved,

Unless sued while director, etc.

On payment director entitled to assignment of judgment, etc.

(3) Liability for amount unsatisfied on execution.

(4) If the claim for such debt has been proved in liquidation or winding-up proceedings a director, upon payment of the debt, shall be entitled to any preference which the creditor paid would have been entitled to, and where a judgment has been recovered he shall be entitled to an assignment of the judgment. 2 Geo. V. c. 31, s. 96.

See Dominion Act, s. 85, which the above section substantially follows, except for the addition of sub-sections 2 (*b*) and 4 above set out. Sub-section (1) differs from the Dominion section by omitting the word "clerks."

PART VII.

Sect. 99.

PROSPECTUS AND DIRECTORS' LIABILITY.

Interpretation.

99.—(1) In this Part,

"Company."

(*a*) "Company" shall include a company proposed to be incorporated;

"Prospectus."

(*b*) "Prospectus" shall mean any prospectus, notice circular, advertisement or other invitation offering for subscription or purchase any shares, debentures, debenture stock, or other securities of a company, or published or issued for the purpose of being used to promote or aid in the subscription or purchase of such shares, debentures, debenture stock or securities. 2 Geo. V. c. 31, s. 97 (1).

See Dominion Act, s. 43.

The meaning of sub-section (b) was considered in *McCurdy* v. *Oak Tire, &c., Co., Ltd.* (1919), 44 O. L. R. 571.

An advertisement designed to accomplish the purpose mentioned in sub-section (*b*) is a prospectus within the meaning of the section: *Re Rex* v. *Garvin* (1909), 18 O. L. R. 49. The judgment indicates that the scope of the sub-section is very wide. *Quaere*, whether it is a compliance with the Act to publish the filed prospectus along with and as part of an advertisement which is not itself filed. In *Rex* v. *Garvin*, *supra*, Meredith, C.J., said at page 55, "It is plain from the Act I think, that it has in view the issue not of one but of several prospectuses, and the policy of the Act appears to be that upon every occasion upon which the company desire to issue a prospectus for the purpose of inviting persons to take stock or to lend money to or to take the debentures of the company, there shall be a prospectus filed, and that it shall contain the information which the Act requires to be inserted in the prospectus; and that what it requires is that the prospectus, in every case in which a prospectus is necessary, is to be filed with the Secretary, and that the published prospectus shall state on its face that it has

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been so filed. It seems to me, therefore, that it follows that when the document in question was published, it ought to have contained what the prospectus then on file in the Secretary's office contained; and—I leave out of consideration any mere verbal difference —that any difference between the advertisement which was published and the prospectus filed made the publication of the advertisement a violation of the Act, and rendered a director who was a party to the issuing of it liable to the penalties mentioned in s. 100 (now s. 105)."

Semble, a mere statement that there is a company offering shares for sale, and that a prospectus can be obtained on application, is an infraction of the Act, *ibid.*

Application of this part.

(2) This Part, except section 102, shall apply to every company, whether formed before or after the commencement of this Act, which offers to the public for subscription shares, debentures, debenture stock or other securities and to every company, whether incorporated under the law of Ontario or otherwise, the shares, debentures, debenture stock or other securities of which are dealt in within Ontario. 2 Geo. V. c. 31, s. 97 (2); 3-4 Geo. V. c. 18, s. 33 (16).

Quære, whether sub-section (2) affects a Dominion Company.

As to the scope of the above sub-section, see *Crawford* v. *Bathurst Land, &c., Co.* (1918), 42 O. L. R. 256, 263.

When company deemed to be offering shares, etc., to the public.

(2) This Part, except section 102, shall apply to every or any person employed or authorized by it for that purpose, directly or indirectly invites or solicits either orally or by a prospectus, or any other means, any other person to apply or subscribe for or to buy or otherwise acquire any shares, debentures, debenture stock or other securities of the company, or where any person who has subscribed for or underwritten or to whom has been allotted the whole or the major part of any issue of the company's shares, debentures, debenture stock or other securities so invites or solicits any person to apply or subscribe for or to buy or otherwise acquire any of such last mentioned shares, debentures, or debenture stock, the company shall be deemed to offer to the public for subscription within

the meaning of this Act, its shares, debentures, debenture stock or other securities. 2 Geo. V. c. 31, s. 97 (3). Sect. 99.

100.—(1) Upon any offer of shares to the public for subscription a company may pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares, if the payment of the commission and the amount or rate of the commission paid or agreed to be paid are authorized by the Letters Patent or Supplementary Letters Patent and disclosed in the prospectus, and the commission paid or agreed to be paid does not exceed the amount or rate so authorized. When a commission may be paid.

(2) Except as provided by sub-section 1 no company shall apply any of its shares or capital, either directly or indirectly, in payment of any commission, discount or allowance to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally for any shares of the company or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such shares, whether the shares or capital be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or be paid out of the nominal purchase money or contract price or otherwise. Capital not to be applied in paying commissions except as provided.

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay. 2 Geo. V. c. 31, s. 98. Brokerage may be paid.

The above section follows with modifications s. 89 of the Imperial Companies (Consolidation) Act, 1908, for a discussion of which section see Buckley, 9th ed., pp. 212-217.

In connection with the departures from the Imperial section, it should be noted that sub-section (1) only authorizes the payment of commission in respect of an offer of shares to the public for subscription. Apparently the company would be precluded from paying a commission in respect of a private sale or subscription of its shares.

But it should also be noted that the statutory statement in lieu of prospectus (Form 5), contemplates the payment of commission and that such statement is used where there is no public issue. Moreover letters patent have been issued expressly authorizing the payment of commission without limitation except as to

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amount, as to which, as regards *shares*, the maximum which will be allowed in the letters patent is 25 per cent. of the amount realized.

Payment of commission.

The articles of a private company authorized payment of a commission to any person in consideration of his procuring subscriptions and the company offered the plaintiff, who was not a broker, a commission in consideration of the plaintiff being the means of providing such sum as the company might accept from her introduction. The amount or rate of the commission was not disclosed under sub-sec. 1. C., as the result of the plaintiff's introduction, subscribed for shares. The company paid the plaintiff £200 commission, and when the plaintiff sued for the balance the company counterclaimed for the amount already paid. It was held that (1) the commission was not brokerage within sub-section 3; (2) it was commission within sub-section 1; not having been disclosed in any statement pursuant to sub-section 1, it was unlawful under sub-section 2. Accordingly the plaintiff could not recover the balance of £260. It had been originally intended that the advance of moneys by C. to the company should be by way of loan, in which event the plaintiff would have been entitled to her commission; the change in this regard having been made without her intervention and as she had no notice that the payment of commission was illegal, the plaintiff was entitled to retain the £200. *Andreae* v. *Zinc Mines* (1918), 2 K. B. 454; 87 L. J. K. B. 1019.

Where the section has not been complied with, a commission wrongfully paid can be recovered, *Re Canadian Diamond Co.* (*Broad's Case*) (1912-13), 6 A. L. R. 42, a case under the Alberta Companies Winding-up Ordinance, 1903.

What companies must file prospectus.

101.—(1) Every public company before offering to the public for subscription shares, debentures, debenture stock or other securities shall issue a prospectus as hereinafter set out.

Purchases, subscriptions, etc., deemed to be induced by prospectus.

(2) All purchases, subscriptions or other acquisitions of shares, debentures, debenture stock or other securities of any company required to file a prospectus or a statement in lieu of a prospectus, shall be deemed, as against the company and the signatories to the prospectus or statement, to be induced by

such prospectus or statement, any term, proviso or condition thereof to the contrary notwithstanding.

Delivery of copy of prospectus or statement before subscription.

(3) A subscription for shares, debentures or debenture stock shall not be binding on the subscriber unless at or before the subscription there is delivered to him a copy of the prospectus, if any, issued by the company, or if a prospectus has not been issued a copy of the statement mentioned in section 102.

Subscriber after notice must elect to withdraw.

(4) The subscriber to be entitled to the benefit of sub-section 3 must elect to withdraw his subscription before or within ten days after notice of the allotment to him of the shares, debentures, or debenture stock for which he has subscribed. 2 Geo. V. c. 31, s. 99.

Failure to deliver prospectus to subscriber.

If no prospectus, or statement in lieu of a prospectus, has been delivered to the subscriber, he is entitled to withdraw; and if no notice of allotment is sent to him he can withdraw at any time: *McCurdy* v. *Oak Tire, &c., Co., Ltd.* (1919), 44 O. L. R. 571.

Under this section when it read, "No subscription for stock . . . induced or obtained by verbal representations, shall be binding upon the subscriber, unless prior to his so subscribing he shall have received a copy of the prospectus" (6 Edw. VII. c. 27, s. 3 (3)), it was held that the rule as to voidable subscriptions applied. The subscriber might approve or disaffirm, and a subscriber who had done nothing to repudiate was held disentitled to raise the defence three years after the date of his subscription: *Morrisburgh & Ottawa* v. *O'Connor* (1915), 34 O. L. R. 161. And in *Re Retail Merchants Association, Ltd.* (1913-4), 7 Alta. L. R. 322, it was held that such a provision is applicable to the case of a company which has never issued a prospectus and that subscribers for shares of a company which has not complied with such provision are not estopped merely by attendance at shareholders' meetings from availing themselves of its protection.

The object of the Act is to protect the public, not a promoter or a person who is to blame for not having a prospectus issued or filed: *Fort William Commercial Chambers* v. *Braden* (1914), 6 O. W. N. 24, affirmed (1914-15), 7 O. W. N. 679.

In the last mentioned case the effect of sub-section (4) is also considered. See also *Aikens* v. *Waugh* (1919), 16 O. W. N. 390.

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Failure to issue a prospectus is a matter for the purchaser to raise. The company can not set up its own default: *Webster* v. *Jury Copper Mines* (1908), 12 O. W. R. 632, 636.

102. Subject matter:—

(1) Statement in lieu of prospectus.

See Dominion Act, s. 43C.

(2) Not to apply to a private company.

See Dominion Act, s. 43C (2).

103. Subject matter:—

(1) Date of prospectus.

(2) Prospectus to be signed and filed.

(3) Not to be filed until signed; etc.

(4) Not to be issued until filed.

See Dominion Act, s. 43A.

104. Subject matter:—

(1) What to be disclosed in prospectus.

Particulars as to incorporators.

(*a*) The names, descriptions and addresses of the original incorporators, and the number of shares subscribed for by them respectively;

(*b*) Qualification and remuneration of directors.

(*c*) Directors;

(*d*) Subscription upon which allotment may proceed;

Time of calls.

(*e*) The time or times at which, under the by-laws of the company, a further call or calls may be made upon shares subscribed for;

(*f*) Shares and bonds allotted for other than cash consideration;

(*g*) Vendors of property to company;

(*h*) Consideration for purchase.

Commissions.

(*i*) The amount, if any, paid within the next preceding two years or payable as commission for subscribing, or agreeing to subscribe, or procuring or agreeing to procure subscriptions for any shares in the company, or for underwriting or procuring underwriting of any securities issued or to be issued by the company or the rate of any such commission;

(*j*) Preliminary expenses.

Promoter's remuneration.

(*k*) The amount paid for the next preceeding three years or intended to be paid in cash, shares, debentures, debenture stock or other securities, to any promoter and the consideration for any such payment;

(*l*) The date of and parties to every material contract not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or a contract entered into more than three years before the date of issue of the prospectus, and a reasonable time and place at which such material contract or a copy thereof may be inspected; Particulars as to material contracts.

(*m*) Names, etc., of auditors;

(*n*) Interest of directors in property taken by company.

See Dominion Act, s. 43 B (1). Sub-sections (*i*), (*k*) and (*l*) differ from the corresponding Dominion sections by making the period three years instead of two, and the Dominion sub-section corresponding to subsection (*i*) above provides that the commission payable to sub-underwriters need not be stated.

(2) Subject matter:—
"Vendor" what to include.

See Dominion Act, s. 43 B (2).

(3) Subject matter:—
When "vendor" includes "lessor."

See Dominion Act, s. 43 B (3)..

(4) The requirements as to the original incorporators and the qualification, remuneration, and interest of directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date of the first general meeting. Requirements as to original incorporators not essential where issued more than one year after first general meeting.

See Dominion Act, s. 43 B (8).

(5) In the case of a prospectus issued more than one year after the date of such meeting the obligation to disclose all material contracts shall be limited to a period of two years next preceding the issue of the prospectus. Obligation to disclose material contracts limited.

(6) Subject matter:—
When prospectus advertised in newspapers.

See Dominion Act, s. 43 B (5), which is slightly different in its terms.

(7) Subject matter:—
Application of section.

See Dominion Act, s. 43 B (7).

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(8) Subject matter:—
Waiver of compliance with section to be void.

See Dominion Act, s. 43 B (4).

Penalty.

105.—(1) Every provisional director, director or other person responsible for the issue of a prospectus for every violation of any of the provisions of the next preceding four sections shall incur a penalty not exceeding $200, unless

Exceptions.

(*a*) As regards any matter not disclosed, he was not cognizant thereof; or

(*b*) The non-compliance arose from an honest mistake of fact on his part;

(*c*) In the case of non-compliance with the requirements of paragraph *n* of sub-section 1 of section 104, it is proved that he had no knowledge of the matters not disclosed.

See Dominion Act, s. 43 B (6).

Liability under general law not affected.

(2) Nothing in this section or the next preceding four sections shall limit or diminish any liability which any person may incur under the general law apart from this Act. 2 Geo. V. c. 31, s. 103.

See Dominion Act, s. 43 B (9).

Capital to be correctly stated in advertisements, etc.

106.—(1) Where any advertisement, letter-head, account or document issued or published by any corporation or any of its officers, agents or employees purports to state the capital of the corporation, unless it is stated to be the authorized capital, then the capital actually and in good faith subscribed, and no more shall be so stated.

Penalty.

(2) Any such corporation, officer, agent or employee who causes to be inserted an advertisement or who publishes, issues or causes to be published or issued any advertisement, letter-head, account or document which states the capital, otherwise than as mentioned in sub-section 1, or which contains any false statement as to the incorporation, control, supervision, management or financial standing of such corporation shall incur a penalty of not less than $50 nor more than $200. 2 Geo. V. c. 31, s. 104.

107. Subject matter:—
(1) Liability for statements in prospectus.

See Dominion Act, s. 43 D. (1), which the above section substantially follows, except that the order of the sub-sections is changed and that a "notice" as well as a prospectus and "other securities" as well as shares, debentures, etc., are covered.

(2) Subject matter:—
Who to be deemed a promoter.

See Dominion Act, s. 43 D (5). The Ontario section includes a "notice" as well as a prospectus.

108. Subject matter:—
Statements in prospectus for raising further capital.

See Dominion Act, s. 43 D (2), which is limited to companies existing on September 1, 1917.

109. Subject matter:—
Indemnity where name of person has been improperly inserted.

See Dominion Act, s. 43 D (3). The Ontario section covers a "notice" as well as a prospectus.

110. Subject matter:—
Contribution from co-director.

See Dominion Act, s. 43 D (4). The Ontario section covers a "notice" as well as a prospectus.

PART VIII.

PUBLIC COMPANIES.

Application of Part VIII.

111. This part shall apply to all public companies except those which do not offer shares, debentures or debenture stock to the public for subscription. 2 Geo. V. c. 31, s. 109.

Restrictions on allotment. Imp. Act, 1908, s. 85.

112.—(1) No allotment shall be made of any share capital offered to the public for subscription unless

(*a*) The amount, if any, named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or,

(*b*) If no amount is so named the whole amount of the share capital so offered for subscription

has been subscribed, and the sum payable on application for the amount so named, or for the whole amount offered for subscription has been paid to and received by the company.

Minimum subscription.

(2) The amount so named and the whole amount shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription.

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Amount payable on application.

(3) The amount payable on application on each share shall not be less than five per centum of the nominal amount of the share.

Repayment where conditions not complied with.

(4) If such conditions have not been complied with on the expiration of ninety days after the first issue of the prospectus all money received from applicants for shares shall be forthwith repaid to them without interest, and if any such money is not so repaid within one hundred days after the issue of the prospectus the directors of the company shall be jointly and severally liable to repay that money with interest from the expiration of the ninety days, but a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

Extension of time.

(5) The Provincial Secretary may extend the times by this section limited.

Condition as to waiving compliance void.

(6) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

Not applicable to subsequent allotments.

(7) This section, except sub-section 3, shall not apply to any allotment of shares subsequent to the first allotment of shares offered by a public company. 2 Geo. V. c. 31, s. 110.

The above section follows s. 85 of the Imperial Companies (Consolidation) Act, 1908, for a discussion of which see Buckley, 9th ed., p. 196.

Shares may be allotted before the company is entitled to commence business: *Re Western Canadian Fire, Craig's Case* (1914), 19 D. L. R. 170.

Part VIII is for the protection of shareholders, and the effect of non-compliance is to entitle subscribers to cancellation of their subscriptions and removal of their names from the list of contributories notwithstanding a winding-up under the Dominion Act: *Re Carpenter, Ltd., Hamilton's Case* (1916), 29 D. L. R. 683; 35 O. L. R. 626.

Effect of irregular allotment. Imp. 1908, s. 86.

113.—(1) An allotment made by a company to an applicant in contravention of the foregoing provisions of this Part shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company, and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.

Director to compensate company and allottee.

(2) If any director of a company knowingly contravenes or permits or authorizes the contravention of any of the foregoing provisions of this Part with respect to allotment he shall be liable to compensate the company and the allottee respectively

for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby. Sect. 113.

(3) No action shall be brought to recover such loss, damages or costs after the expiration of two years from the date of the allotment. 2 Geo. V. c. 31, s. 111. Proceedings to be commenced within two years.

See Imperial Companies (Consolidation) Act, 1908, s. 86 and Buckley, 9th ed., p. 197.

An allotment without compliance with the provisions of s. 112 is voidable, not void: *Finance and Issue, Ltd.* v. *Canadian Produce Corporation* (1905), 1 Ch. 37, 43. If it is to be avoided it can only be upon a record properly framed for that purpose: *Gowganda Queen Mines* v. *Boeckh* (1911), 24 O. L. R. 293, 300; affirmed (1912), 46 S. C. R. 645.

See articles in (1909) Canada Law Journal at pp. 145, 220, 338.

Where no statutory meeting has been held, the applicant's claim to cancellation is still in time, notwithstanding a winding-up: *Re Carpenter, Ltd., Hamilton's Case* (1916), 29 D. L. R. 683; 35 O. L. R. 626.

Actual legal proceedings to rescind an allotment made in contravention of s. 112 need not be taken within the month; notice of avoidance, followed by prompt legal proceedings, will suffice: *ibid. Semble*, the notice need not specify the ground of avoidance: *In re National Motor Mail-Coach* (1908), 2 Ch. 228. The option to cancel is the shareholder's; the company can not insist on paying back the application moneys against the shareholder's wish: *Burton* v. *Bevan* (1908), 2 Ch. 240.

114.—(1) A company shall not commence any business or exercise any borrowing powers unless: Restrictions on commencement of business. Imp. 1908, s. 87.

(*a*) Shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription; and,

(*b*) Every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a portion equal to the proportion payable on application and allotment on the shares offered by a public company; and,

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(c) There has been filed with the Provincial Secretary a statutory declaration by the secretary or one of the directors in the prescribed form that such conditions have been complied with and the Provincial Secretary has certified as provided by sub-section 2.

Certificate that company may commence business.

(2) The Provincial Secretary may, on the filing of the statutory declaration, certify that the company is entitled to commence business, and the certificate shall be conclusive evidence that the company is so entitled, but upon it being shown that the certificate was made upon any false statement or upon the withholding of any material statement the Provincial Secretary may cancel and annul such certificate.

Cancellation of certificate

Effect of contracts previously made.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

Simultaneous offer of shares and debentures.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares, debentures, or debenture stock or the receipt of any money payable on any application.

Penalty for commencing business before proper time.

(5) If any company commences business or exercises borrowing powers in contravention of this section every person who is responsible for the contravention shall, without prejudice to any other liability, incur a penalty not exceeding $50 for every day during which the contravention continues.

Innocent non-compliance with 7 Edw. VII. c. 34, s. 108.

(6) Where a company has commenced business without having complied with the requirements of sub-section 1 of section 108 of *The Ontario Companies Act,* 1907, and the Lieutenant-Governor-in-Council is satisfied that the non-compliance was due to inadvertence, error or mistake, and that before commencing business the conditions mentioned in clauses (*a*) and (*b*) of that section had been complied with, he may authorize the company to file the statutory declaration *nunc pro tunc,* and if it is filed within one month after the date of the Order-in-Council it shall have the same effect as if it had been filed before the company commenced business. 2 Geo. V. c. 31, s. 112.

See Imperial Companies (Consolidation) Act, 1908, s. 87, and Buckley, 9th ed., p. 199.

Suing for calls is not commencing business: *Fort William Commercial Chambers* v. *Braden* (1914), 6 O. W. N. 24; affirmed (1914-5), 7 O. W. N. 679.

The form of statutory declaration required under sub-section (1) (c) is obtainable gratis from the Department.

The Imperial section corresponding to sub-section (2) reads *shall* instead of *may,* and it should also be

noted that under the Ontario section the certificate may be withdrawn if it is shown to have been made upon any false statement or upon the withholding of any material statement. What the effect of such withdrawal is on existing contracts is not stated. Under these circumstances, it may be important for persons contracting with a company recently organized to satisfy themselves that no misstatement or withholding of material statements has taken place. The writers are not aware of any certificate having been withdrawn under the section. Sect. 114.

As to the conclusiveness of the certificate, see *Gowganda Queen Mines* v. *Boeckh* (1911), 24 O. L. R. 293, 299; affirmed (1912) 46 S. C. R. 645.

This sub-section was considered in *Re Carpenter, Ltd., Hamilton's case* (1915) 29 D. L. R. 683; where Clute, J., at pages 696, 697, said: "These provisions have been held to apply so as to prevent the recovery even in winding-up proceedings: *In re Otto Electrical Manufacturing Co.* (1905) *Limited* (1906), 2 Ch. 390, where it was held that the word "provisional" means that the contract is to be read as if it contained a provision that it should not be binding upon the company unless and until the company became entitled to commence business. It was there held that the section applies to all contracts of a company, whether preliminary or final, or in the course of carrying on its business. Where therefore, the company had gone into liquidation without having become entitled to commence business, a claim by a person resting on certain alleged contracts with the company, one part of the claim being for moneys paid for furnishing temporary offices for the company, was disallowed. See also *New Druce-Portland Co. Limited* v. *Blakiston* (1908), 24 Times L. R. 583." Sub-sec. (3).

115. All sums received by the company or by any promoter, director, officer or agent thereof shall be held in trust by the company or such promoter, director, officer or agent until deposited in a chartered bank to the credit of the company and shall be so deposited and there remain in trust until the issue of the certificate by the Provincial Secretary. 2 Geo. V. c. 31, s. 113. Moneys to be held in trust.

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Return of allotments. Imp. Act, 1908, s. 88.

116.—(1) Where a company makes any allotment of its shares it shall, within two months thereafter, file with the Provincial Secretary:

(*a*) A return of the allotments, stating the number and nominal amount of the shares comprised in each allotment, the names, addresses and descriptions of the allottees, and the amount, if any, paid or due and payable on each share; and

(*b*) In the case of shares allotted in whole or in part for a consideration other than cash, a contract in writing constituting the title of the allottee to such allotment, together with any contract of sale, or for services or other consideration in respect of which such allotment was made and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

Penalty for default.

(2) If default is made in complying with the requirements of this section every director, manager, secretary or other officer of the company who is knowingly a party to the default shall incur a penalty not exceeding $50 for every day during which the default continues. 2 Geo. V. c. 31, s. 114.

See Imperial Companies (Consolidation) Act, 1908, s. 88, and Buckley, 9th ed., pp. 200-211.

No particular form of return is prescribed. The Ontario section does not make any provision for relief in the event of accidental or inadvertent failure to make the return within the time prescribed. In such case it is submitted that the only course is to re-allot without prejudice to any prior transfers of shares.

Statutory meetings.

117.—(1) Every company shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of its shareholders, which shall be called the statutory meeting.

[*As to notice of meetings, see section 44.*]

Report to be sent to shareholders.

(2) The directors shall, at least ten days before the day on which the meeting is to be held, send to every shareholder a report certified by not less than two directors stating:

(*a*) The total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;

(*b*) The total amount of cash received by the company in respect of such shares so distinguished;

(*c*) An abstract of the receipts and payments of the company on capital account to the date of the report, and an account or estimate of the preliminary expenses of the company;

(*d*) The names, addresses and descriptions of the directors, auditors, if any, manager, if any, and secretary of the company; and

(*e*) The particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification.

Report to be certified by auditors.

(3) The report, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, shall be certified as correct by the auditors, if any, of the company.

Report to be filed with Provincial Secretary.

(4) The directors shall cause a copy of the report so certified to be filed with the Provincial Secretary forthwith after the sending thereof to the shareholders.

Lists of shareholders to be produced at meeting.

(5) The directors shall cause a list showing the names, descriptions and addresses of the shareholders and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any shareholder during the continuance of the meeting.

Shareholders may discuss business of company at meeting.

(6) The shareholders present at the meeting shall be at liberty to discuss any matter relating to the formation of the company, or arising out of the report, whether previous notice has or has not been given, but no resolution of which notice has not been duly given may be passed.

Adjournments.

(7) The meeting may be adjourned from time to time, and at an adjourned meeting any resolution of which notice has been duly given, either before or subsequently to the former meeting, may be passed, and at the adjourned meeting the same powers may be exercised as at an original meeting.

Application to Court if default made in holding meeting.

(8) If default is made in filing such report or in holding the statutory meeting, then at the expiration of fourteen days after the last day on which the meeting ought to have been held any shareholder may apply to the Court for the winding up of the company, and the Court may either direct that the company be wound up or give directions for the report being filed or a meeting being held, or make such other order as may be deemed just, and may order that the costs of the application be paid by any person who, in the opinion of the Court, is responsible for the default. 2 Geo. V. c. 31, s. 115.

See Imperial Companies (Consolidation) Act, 1908, s. 65.

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The date at which the company is entitled to commence business, from which the period mentioned in sub-sec. (1) runs, is the date of the certificate given under s. 114.

The notice must state that the meeting is the statutory meeting: *Gardner* v. *Iredale* (1912), 1 Ch. 700.

In a *bona fide* case of inadvertent failure to hold the meeting, an order directing the holding of the meeting may be obtained from a Judge in Chambers on notice of motion, supported by affidavits. It is advisable to have the company represented and consent to the order.

117*a*. Subject matter:—
Cheese and butter factories.

PART IX.

BOOKS, INSPECTION AND AUDITORS.

118. Subject matter:—
Record books to be kept and contents.

See Dominion Act, ss. 89 and 90.

Books to be kept at head office.

119.—(1) The books mentioned in the next preceding section and in section 124, shall be kept at the head office of the corporation within Ontario, whether the company is permitted to hold its meetings out of Ontario or not.

Penalty for removal.

(2) Any director, officer or employee of a corporation who removes or assists in removing such books from Ontario or who otherwise contravenes the provisions of this section shall incur a penalty of $200.

Proviso.

(3) Upon necessity therefor being shown and adequate assurance given that such books may be inspected within Ontario by any person entitled thereto after application for such inspection to the Provincial Secretary the Lieutenant-Governor in Council may relieve any corporation permitted to hold its meetings out of Ontario from the provisions of this section upon such terms as he may see fit. 2 Geo. V. c. 31, s. 117.

See Dominion Act, s. 91.

Application to keep the company's books out of Ontario may be made by a company which by its letters

patent or supplementary letters patent has authority to hold its meetings out of Ontario. Accordingly, it is advisable to ask for such authority in the petition for incorporation. Sect. 119.

Many companies for the purpose of listing their shares on a stock exchange outside of Ontario, or for other purposes, find it necessary or convenient to have their share register and register of transfers kept by a registrar and transfer agent resident outside the Province. In such instances the company must take steps to be relieved from the provisions of the section as above provided. The following are the instructions issued by the Department:—

Keeping Books out of the Province of Ontario.

Departmental instructions.

1. Upon necessity therefor being shown and adequate assurance given that the books of a corporation may be inspected within Ontario by any person entitled thereto after application for such inspection to the Provincial Secretary, the Lieutenant-Governor in Council may relieve any corporation permitted to hold its meetings out of Ontario from the provisions of the sections which state that the books of a corporation shall be kept at the head office of the corporation within Ontario, whether the company is permitted to hold its meetings out of Ontario or not, and that any director, officer or employee of a corporation who removes or assists in removing such books from Ontario or who otherwise contravenes the provisions of said sections shall incur a penalty.

2. The application must be a formal petition of the corporation, signed by the executive officers of the corporation and passed under its common seal.

3. The petition must set forth the corporate name, the date of incorporation and other material facts and should show

(*a*) That the bulk of the shareholders live without the Province of Ontario and that it is a matter of convenience to have the books removed therefrom;

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Removal of books from Province.

(*b*) That the corporation has authority to hold meetings out of the Province;

(*c*) That the corporation is not in arrears in making its annual returns.

4. The facts in the petition contained must be verified by joint affidavit or statutory declaration of the President and Secretary of the corporation.

5. The signatures to the petition and impression of the seal must be verified by affidavit or statutory declaration.

6. With the petition the corporation must produce the following:

(*a*) A statutory declaration proving that the by-law authorizing the application for an Order-in-Council relieving the corporation from the provisions of sub-sections 1 and 2 of section 119 of *The Ontario Companies Act* has been lawfully passed by the directors and confirmed by a vote of the shareholders, present or represented by proxy at a general meeting duly called for considering the same by notice specifying the terms of the by-law to be confirmed, and holding not less than two-thirds of the issued capital stock represented at such meting, or, in the case of a corporation not having share capital, by a vote of two-thirds of the members so present or represented as the case may be;

(*b*) A copy of the by-law certified as such under the seal of the corporation;

(*c*) A certified copy of the proceedings at the meeting of shareholders or members with respect to the passage and sanction of the by-law;

(*d*) A certified extract from the general by-laws of the corporation as to the calling of the meeting of shareholders or members;

(*e*) A certified copy of the notice mailed or copy of advertisement in the *Ontario Gazette* or local paper of the holding of such shareholders' or members' meeting;

(*f*) A power of attorney duly executed under the seal of the corporation.

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Departmental instructions.

The attorney appointed by the applicant corporation must be a person resident in Ontario, or a corporation having its head office in the Province.

The power may contain any provision not inconsistent with the duties of the attorney to be exercised under the laws of the Province, but it must include words expressly authorizing the attorney:—

"To act as such, and to sue and be sued, plead or be impleaded in any court in Ontario and generally on behalf of the corporation and within Ontario to accept service of process, and to receive all lawful notices, and, for the purposes of the corporation, to do all acts and execute all deeds and other instruments relating to the matters within the scope of the power of attorney."

The power must also provide that until due lawful notice of the appointment of another and subsequent attorney has been given to and accepted by the Provincial Secretary, service of process or of papers and notices upon the person or corporation mentioned in the original or other power last filed with the Provincial Secretary shall be accepted by the applicant corporation as sufficient service in the premises.

(*g*) The consent of the attorney to act as such, duly verified by affidavit or statutory declaration of subscribing witness;

(*h*) A consent to the winding-up of the corporation, which consent shall be in the following form:

After application made to the Secretary of the Province of Ontario by any person entitled thereto for the inspection of such of the books of ..... hereinafter called "the corporation" as are mentioned in Sections 118 and 124 of *The Ontario Companies Act*, and upon the failure of the corporation to comply with all proper and reasonable directions for such inspection, which may, upon due

Sect. 119.

Removal of books from Province.

notice to the corporation, be made by the said Provincial Secretary, and upon its appearing to the satisfaction of a Judge of the Supreme Court of Ontario, upon a petition in that behalf presented by such persons applying as aforesaid upon due notice to the corporation that such person has suffered substantial loss or damage by reason of such failure, THE CORPORATION DOTH HEREBY CONSENT to an order of such Judge for winding up the corporation.

IN WITNESS WHEREOF the corporation has caused its corporate seal to be affixed hereto by the hands of its proper officers in that behalf, this ..... day of ....., 19....

By .

Witness:

President. (Seal)

Secretary.

and

(*i*) A bond to the Provincial Treasurer in the sum of $500, which bond shall be in the following form:

Bond.

WHEREAS Section 119 of *The Ontario Companies Act* provides that the books therein referred to shall be kept at the head office of the corporation within Ontario, whether the corporation is permitted to hold its meetings out of Ontario or not.

AND WHEREAS the said Section 119 further provides that, upon the conditions therein mentioned, the Lieutenant-Governor in Council may relieve any corporation permitted to hold its meetings out of Ontario from the provisions of the said Section 119, upon such terms as he may see fit, necessity therefor being shown and adequate assurance given that such books may be inspected within Ontario by any person entitled thereto after application for such inspection to the Provincial Secretary.

AND WHEREAS the corporation hereinafter mentioned, being a corporation permitted to

hold its meetings out of Ontario, has by its petition in that behalf prayed that it may be relieved from the provisions of the said Section 119. Sect. 119.

AND WHEREAS the Secretary of the Province of Ontario has directed that, as a condition of granting the said relief, these presents be executed by the said corporation.

NOW THEREFORE THESE PRESENTS WITNESS that ..... is held and firmly bound unto the Treasurer of the Province of Ontario for the time being in the penal sum of five hundred dollars ($500), to be paid to said Provincial Treasurer for the time being, or to any person who may be entitled, upon assignment from the said Provincial Treasurer for the time being, to recover the sum hereby secured, for which payment well and truly to be made . . . . binds itself, its successors and assigns, firmly by these presents.

IN WITNESS WHEREOF ..... has caused its corporate seal to be affixed hereto by the hands of its proper officers in that behalf, this .....day of ....., 19....

By

Witness:

(Corporation)

President. (Seal)

Secretary.

THE CONDITION OF THIS OBLIGATION IS SUCH that if ..... doth at all proper times allow the books mentioned in Section 119 of *The Ontario Companies Act* aforesaid to be inspected by any person entitled thereto as the Secretary of the Province of Ontario may direct from time to time by due notice to the said corporation, after application to him by such person for such inspection, then this obligation is to be void, otherwise to remain in full force and virtue.

Sect. 120.

Untrue entries.

120.—(1) No director, officer or employee of the corporation shall knowingly make or assist in making any untrue entry in any of its books, or refuse or neglect to make any proper entry therein.

Penalty.

(2) Any person wilfully violating the provisions of this section shall be liable in damages for all loss or injury which any person interested may have sustained thereby. 2 Geo. V. c. 31, s. 118.

See Dominion Act, s. 117.

Powers of Judge as to entries in, omissions from and rectification of books.

121.—(1) If the name of any person is, without sufficient cause, entered in or omitted from any such book, or if default is made or unnecessary delay takes place in entering therein the fact of any person having ceased to be a shareholder or member of the corporation, the person or shareholder or member aggrieved, or any shareholder or member of the corporation, or the corporation itself, may apply to the Supreme Court, for an order that the book or books be rectified, and the Court may either refuse such application or may make an order for the rectification of the book and may direct the corporation to pay any damages the party aggrieved may have sustained.

Decision as to title.

(2) The Court may, in any proceeding under this section, decide any question relating to the title of any person who is a party to such proceedings to have his name entered in or omitted from such books, whether such question arises between two or more shareholders, or alleged shareholders, or members, or between any shareholder or alleged shareholder or member and the corporation, and the Court may in any such proceeding decide any question which it may be necessary or expedient to decide for the rectification of the books.

Trial of issue.

(3) The Court may direct an issue to be tried.

Appeal.

(4) An appeal shall lie from the decision of the Court as if the same had been given in an action.

Jurisdiction of Courts not affected.

(5) This section shall not deprive any Court of any jurisdiction it may otherwise have.

Costs.

(6) The costs of any proceeding under this section shall be in the discretion of the Court. 2 Geo. V. c. 31, s. 119.

See Imperial Companies (Consolidation) Act, 1908, s. 32 and Buckley, 9th ed., pp. 84 ff.

Sections 118, 119 and 121 are not to be invoked except in a reasonably clear case: *Re Gramm Motor Truck Co. of Canada and Bennett* (1915-6), 35 O. L. R. 224.

Without sufficient cause

Where a person is induced by fraud to become a shareholder and is registered as such; the entry of his name is without sufficient cause. See the notes to s. 43

of the Dominion Act, *supra*, under "Rescission" at page 195. Sect. 121.

In *Lorsch* v. *Shamrock Consolidated* (1917), 39 O. L. R. 315, an order was made under the section directing registration.

The section does not enable the court to relieve a shareholder declared to be such in the charter: *Re J. A. French & Co., Ltd.* (1909-10), 1 O. W. N. 864; but in the same case on appeal, the Divisional Court permitted rectification of the register by reducing the applicant's holding to one share: (1910-11), 2 O. W. N. 498.

The directors should confirm unobjectionable transfers at the next meeting. Otherwise there is "unnecessary delay." Default, etc.

122. Subject matter:—

(1) Books to be open for inspection.

See Dominion Act, s. 91.

(2) Liability for refusal to allow inspection of books.

See Dominion Act, s. 117, where the penalty is different.

123. Subject matter:—

Books to be *prima facie* evidence.

See Dominion Act, s. 107.

124. The directors shall cause proper books of account to be kept containing full and true statements of:— Books of account to be kept.

(*a*) The financial transactions of the corporation;

(*b*) The assets of the corporation;

(*c*) The sums of money received and expended by the corporation, and the matters in respect of which such receipt or expenditure took place;

(*d*) The credits and liabilities of the corporation; and a book or books containing minutes of all the proceedings and votes of the corporation, or of the board of directors, respectively, verified by the signature of the president or other presiding officer of the corporation. 2 Geo. V. c. 31, s. 122. And minute books.

125. If any person in any return, report, certificate, balance sheet or other document required by or for the purposes of this Act wilfully makes a statement false in any material par- False returns, etc.

Sect. 125.

ticular he shall be liable to imprisonment for a term not exceeding three months, and shall incur a penalty not exceeding $100 in lieu of or in addition to such imprisonment. 2 Geo. V. c. 31, s. 123.

Penalty.

The Court may appoint an inspector to make investigation.

126.—(1) Upon an application by not less than one-fifth in value of the shareholders of a corporation with share capital, or one-fifth in number of the members of a corporation without share capital, the Supreme Court may appoint an inspector to investigate its affairs and management.

See Dominion Act, s. 92 (1).

Report on and expense of investigation.

(2) Such inspector shall report thereon to the Court, and the expense of such investigation shall, in the discretion of the Court, be defrayed by the corporation or by the applicants, or partly by the corporation and partly by the applicants.

See Dominion Act, s. 92 (6).

Security for costs.

(3) The Court may require the applicants to give security to cover the probable cost of the investigation, and may make rules and prescribe the manner in which and the extent to which the investigation shall be conducted.

See Dominion Act, s. 91 (1) and (2).

(4) Subject matter:—
Corporation may appoint for same purpose.

See Dominion Act, s. 93 (1).

(5) Subject matter:—
Powers and duties of inspector.

See Dominion Act s. 93 (2).

(6) Subject matter:—
Production of books and documents.

See Dominion Act, ss. 92 (3) and 93 (3).

(7) Subject matter:—
Examination on oath.

See Dominion Act, s. 92 (4).

(8) Subject matter:—
Penalty for non-production.

See Dominion Act, s. 92 (5), s. 119.

Annual audit.

127. The accounts of a corporation shall be examined once at least in every year, and the correctness of the balance sheet shall be ascertained by an auditor or auditors. 2 Geo. V. c. 31, s. 125.

See Dominion Act, s. 105.

Sect. 128.

128. The first auditors of a corporation may be appointed by the directors before the first meeting of the shareholders or members, and shall hold office until the first general meeting. 2 Geo. V. c. 31, s. 126. First auditors.

See Dominion Act, s. 94A (5).

129. Thereafter the auditors shall be appointed by resolution at a general meeting of the corporation and shall hold office until the next annual meeting unless previously removed by a resolution of the shareholders or members in general meeting. 2 Geo. V. c. 31, s. 127. Subsequent auditors.

See Dominion Act, s. 94A (1).

130. The auditors may be shareholders or members of the corporation, but no person shall be eligible as an auditor who is interested, otherwise than as a shareholder or member, in any transaction of the corporation; and no director or other officer of the corporation shall be eligible during his continuance in office. 2 Geo. V. c. 31, s. 128. Auditors may be shareholders.

See Dominion Act, s. 94A (3).

131. Subject matter:—
In default Provincial Secretary may appoint.

See Dominion Act, s. 94A (2).

132. The directors of a corporation may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act, and any auditor shall be elegible for reappointment. 2 Geo. V. c. 31, s. 130. Directors may fill casual vacancy.

See Dominion Act, s. 94A (6).

133. Subject matter:—
Remuneration of auditors.

See Dominion Act, s. 94A (7).

134. Subject matter:—
(1) Rights and duties of auditors.

See Dominion Act, s. 94B (1).

(2) The auditors shall sign a certificate at the foot of the balance sheet stating whether or not their requirements as auditors have been complied with, and shall make a report to the shareholders or members on the accounts examined by them, and on every balance sheet laid before the corporation in general meeting during their tenure of office: and in every such Certificate and report

Sect. 134. report shall state whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the corporation's affairs as shown by its books.

See Dominion Act, s. 94B (2).

Reading at general meeting.

(3) Such report shall be read at the general meeting. 2 Geo. V. c. 31, s. 133.

See Dominion Act, s. 105 (2) (*c*).

PART X.

MISCELLANEOUS.

Annual summary.

135. Subject matter:—
Annual summary of the affairs of the company.

See Dominion Act, s. 106.

Every corporation is required before February 1st of each year to make out a summary as of December 31st next preceding, containing the particulars prescribed in the section. Full instructions for the preparation and filing of the report, and posting up in the company's office, are contained in the blank forms obtainable from the Department.

The summary must be transmitted to the Provincial Secretary on or before February 8th next after the time when it must be made (sub-sec. 5). The corporation need not comply with the section in the calendar year in which it was organized or went into operation, whichever first happened.

In *Seagram* v. *Pneuma Tubes, Ltd.* (1918), 43 O. L. R. 513, the secretary, as well as the company, was held liable for penalties incurred under the section, the conduct of the secretary having shown that he wilfully permitted the default. This case applied and followed *Park* v. *Lawton* (1911), 1 K. B. 588. See also *Seagram* v. *Pneuma Tubes, Ltd.* (1917), 40 O. L. R. 301.

Return to Provincial Secretary of change of directors, etc.

136. Every company shall make a return to the Provincial Secretary from time to time, as the same occur, of all changes among the directors, and shall incur a penalty, not exceeding

$20 for every contravention of this section. 2 Geo. V. c. 31, s. 135. Sect. 136.

No form is prescribed but the return should state the date of retirement, death, removal, etc., the date of election of the new directors and the correct names of the directors named therein.

137. The Provincial Secretary may, whenever he sees fit, require a corporation to make a return upon any subject connected with its affairs, and the corporation shall make the return within the time mentioned in the notice requiring the same 2 Geo. V. c. 31, s. 132. Return may be required upon any subject.

138. Subject matter:—

(1) Fees on letters patent, etc., to be fixed by Order-in-Council.

(2) Fees may vary in amount.

(3) Restriction.

See Dominion Act, s. 24.

The following are the Departmental regulations and instructions with regard to fees.

Fees for Incorporation of Companies and Filings under the Ontario Companies Act; for Licenses under the Extra Provincial Corporations Act and for Licenses in Mortmain.

1. Fees must accompany all applications and all documents to be filed. Where the fee does not accompany a document to be filed such document will be returned to the sender forthwith. *Vide* Sections 138 and 139 of The Ontario Companies Act. Departmental fees.

2. No cheque will be accepted unless it is *marked*.

3. Cash *not registered* is at the risk of the sender.

4. Post office orders, postal notes, cheques and drafts should be payable to the order of the *Provincial Treasurer*.

The following schedule of fees shall be payable for the various services rendered by the Department under the provisions of The Ontario Companies Act and Extra Provincial Corporations Act:—

Sect. 138.

INCORPORATON WITH SHARE CAPITAL.

Departmental fees.

When the proposed capital of an applicant company is $40,000 or less, the fee shall be $100.

When the proposed capital is more than $40,000, but does not exceed $100,000, the fee shall be $100 and $1 for every $1,000 or fractional part thereof in excess of $40,000.

When the proposed capital is more than $100,000, but does not exceed $1,000,000, the fee shall be $160 and $2.50 for every $10,000 or fractional part thereof in excess of $100,000.

When the proposed capital is more than $1,000,000 the fee shall be for $385 for the first $1,000,000 and $2.50 for every $10,000 or fractional part thereof in excess of $1,000,000.

Rural telephone companies, and other rural companies coming within the provisions of Part XII. of The Ontario Companies Act, where the proposed capital does not exceed $25,000—$25.00.

Where the proposed capital is more than $25,000 the fee shall be on the same scale as that applying to ordinary share capital companies.

Rural cemetery companies, rural cheese and butter companies, and other rural companies of a similar nature where the proposed capital does not exceed $10,000 —$10.00.

Co-operative companies where the proposed capital does not exceed $10,000—$10.00.

Where the capital of a company of the classes in the two next preceding paragraphs referred to exceeds $10,000, but does not exceed $25,000, the fee shall be $10 and $1 for every $1,000 or fractional part thereof in excess of $10,000. To take advantage of this special tariff it must be demonstrated to the satisfaction of the Department that the purposes for which the company is being incorporated bring it within the classes referred to.

SUPPLEMENTARY LETTERS PATENT.

Where the capital of a company is increased, the fee shall be according to the foregoing list, *but on the*

increase only. No fee previously paid is taken into account. Sect. 138.

Where the capital is not increased the fee shall be $100.00.

Where the fee payable for incorporation is $25.00 or less, the fee for Supplementary Letters Patent, where the authorized capital is not increased in excess of $25,000, shall be $5.00. Departmental fees.

Amalgamation.

Fees are payable on the same basis as for incorporation.

Orders.

Changing the name of a company	$25 00
Accepting the surrender of a charter	20 00
Accepting the surrender of a charter where the fee payable for incorporation is $25 or less	5 00
Accepting the surrender of a charter of a corporation without share capital	5 00
Permitting a company to keep its books out of the Province	50 00
Approving by-law authorizing distribution of assets	10 00
Approving by-law under Sec. 162, and filings thereunder	2 00

Certificate.

Certificate under Part VIII. of The Ontario Companies Act and filing of necessary documents thereunder	$25 00
Certificate where fee payable for incorporation is $25.00 or less	5 00

Filing Fees.

Prospectus	$2 00
Statement in lieu of prospectus	2 00
Return of allotment (where the company has not obtained a certificate entitling it to commence business)	2 00

Sect. 138. Departmental fees.

Report for statutory meeting	$2 00
By-law providing for sale of shares at a discount	5 00
By-law varying number of directors	2 00
By-law changing head office	2 00
By-law fixing quorum of directors	2 00
Notice of resolution passed for winding-up	2 00
Liquidator's report on winding-up	2 00
Filing duplicate original mortgage under Sec. 82 (2)	2 00
Filing power of attorney	2 00
Filing annual statement of a company having a capital under $50,000	2 00
Filing the annual statement of a company having a capital of $50,000, and less than $100,000	3 00
Filing the annual statement of a company having a capital of $100,000 and less than $1,000,000	5 00
Filing the annual statement of a company having a share capital of $1,000,000 or over.	10 00

Incorporation Without Share Capital.

Charitable corporations and trusts of a similar nature	$5 00
War Charities	No fee
All other incorporations without share capital	10 00
Supplementary Letters Patent	5 00
Change of name	5 00
Surrender	5 00
Filing annual statement	1 00

Extra-Provincial Corporations.

Fees for licenses to Extra-Provincial Corporations are the same as for incorporation of companies under the Act, but are based on the amount of capital to be used in Ontario.

License in Mortmain.

When the authorized capital of an applicant corporation is $40,000 or less the fee shall be $100.

When the authorized capital is more than $40,000, but does not exceed $100,000, the fee shall be $100 and $1 for every $1,000 or fractional part thereof in excess of $40,000.

When the authorized capital is more than $100,000, but does not exceed $1,000,000, the fee shall be $160 and $2.50 for every $10,000 or fractional part thereof in excess of $100,000.

When the authorized capital is more than $1,000,000 the fee shall be $385 for the first $1,000,000 and $2.50 for every $10,000 or fractional part thereof in excess of $100,000.

Supplementary License.

Where the capital of an Extra-Provincial Corporation is increased the fee shall be the same as for the incorporation of companies under the Act, but shall be based only on the amount of the increase to be used in Ontario. No fee previously paid is taken into account.

Varying powers authorized by original License, where capital is not increased....	$100 00
Changing the name of an Extra-Provincial Corporation	10 00
Filing the annual statement of an extra-provincial corporation with any capital up to and including $100,000	5 00
Filing the annual statement of an extra-provincial corporation with any capital exceeding $100,000	10 00

Searches.

Search of returns, one year	$0 25
And so on, adding for each year, 10c.	
Searching returns, two years	35
Searching returns, three years	45
Search by mail, additional	25
Copying, uncertified, per folio	08
Copying, certified, per folio	10
Certificate, additional	50
Fee for copy of Letters Patent	2 50

Sect. 138. Fee for copy of The Ontario Companies Act in pamphlet form $0 50

No compliance with Act to file returns, etc. without payment of fees.

139. No tender or transmission of any return, by-law or other document shall be a due compliance with the provisions of this Act unless and until the prescribed fee for receiving and filing the same has been paid to and has been accepted by the Provincial Secretary. 2 Geo. V. c. 31, s. 137,

Evidence of by-laws.

140. A copy of any by-law of a corporation under its seal and purporting to be signed by any officer of the corporation or a certificate, similarly authenticated, to the effect that a person is a shareholder or member of the corporation, and that dues or other sums payable are due and have not been paid or that a call or assessment has been made, is due and has not been paid, shall be received as *prima facie* evidence of the by-law or of the statements contained in such certificate in all Courts. 2 Geo. V. c. 31, s. 138.

See Dominion Act, s. 109.

Authentication of summons and notices.

141. A document or proceeding requiring authentication by a corporation may be signed by any director, manager or other authorized officer of the corporation, and need not be under its seal. 2 Geo. V. c. 31, s. 139.

Service of notices.

142. A notice or demand to be served or made by a corporation upon a shareholder or member may be served or made either personally or by registered post, addressed to the shareholder or member at his place of abode as it last appeared on the books of the corporation. 2 Geo. V. c. 31, s. 140.

See Dominion Act, s. 97.

143. Subject matter:—
Time of service.

See Dominion Act, s. 98.

Sanctioning by-laws by written consent of all shareholders.

144. Any by-law by this Act requiring confirmation by the shareholders or members of the corporation may in lieu of confirmation at a general meeting be confirmed by the consent in writing of all the shareholders or members. 2 Geo. V. c. 31, s. 142.

See Dominion Act, s. 48, which is limited to by-laws creating preference stock.

Proof of matters under this Act.

145. Proof of any matter which may be necessary to be made under this Act may be made by statutory declaration, affidavit, or deposition before the Provincial Secretary, or any officer to whom the matter may be referred by him, or before any person authorized to take affidavits. 2 Geo. V. c. 31, s 143.

See Dominion Act, s. 112.

PART XI. Sect. 146.

MINING COMPANIES.

Issuing shares at a discount.

146. A mining company incorporated before the first day of July, 1907, or thereafter incorporated under *The Ontario Companies Act* (1907), or under *The Ontario Companies Act* (1912), or under this Act, and made by the Letters Patent subject to the provisions of this Part, may issue its shares at a discount or at other rate in the manner hereinafter prescribed. 2 Geo. V. c. 31, s. 144.

7 Edw. VII. c. 34. 2 Geo. V. c. 31.

Shareholders not personally liable for calls.

147. No shareholder of such company holding shares, issued as herein provided, shall be personally liable for nonpayment of any calls made upon his shares beyond the amount agreed to be paid therefor. 2 Geo. V. c. 31, s. 145.

By-law authorizing issue of shares at a discount.

148. No shares shall be issued at a discount unless authorized by a by-law of the company fixing and declaring the rate and any other terms and conditions of the issue, confirmed at a general meeting of the shareholders duly called for considering the same. 2 Geo. V. c. 31, s. 146.

Verified copy of by-law to be transmitted to Provincial Secretary.

149. A copy of such by-law, within twenty-four hours after the same has been confirmed, shall be transmitted by registered post to the Provincial Secretary, or be filed in his office within five days, and such copy shall be verified as a true copy by the joint affidavit of the president and secretary, and if there are no such officers, or they, or either of them, are, or is, at the proper time unable to make the same, by the affidavit of the president or secretary and one of the directors, or of two of the directors, as the case may require; and if the president or secretary does not make or join in the affidavit the reason therefor shall be stated in the substituted affidavit. 2 Geo. V. c. 31, s. 147.

The petition for incorporation of a mining company should state that the company is to be made subject to the provisions of this Part. The set terms of the introductory objects clause of such a company supplied by the Department are as follows:

Objects clause of mining company.

"(*a*) To acquire, own, lease, prospect for, open, explore, develop, work, improve, maintain and manage mines and mineral lands and deposits, and to dig for, raise, crush, wash, smelt, assay, analyze, reduce, amalgamate, refine, pipe, convey and otherwise treat ores, metals and minerals, whether belonging to the company or not, and to render the same merchantable, and

Sect. 149.

Mining companies.

to sell or otherwise dispose of the same or any part thereof or interest therein; and (*b*) To take, acquire and hold as consideration for ores, metals or minerals sold or otherwise disposed of, or for goods supplied or for work done by contract or otherwise, shares, debentures or other securities of or in any other company having objects similar in whole or in part to those of the company hereby incorporated, and to sell and otherwise dispose of the same."

If the provisions of this section are not complied with, the liability of the shareholder remains as it would be apart from the above provisions: *Bank of Ottawa* v. *Jones* (1919), 46 D. L. R. 407.

For a discussion of the law as to issuing shares at a discount, see the notes to the Dominion Act, *supra,* at p. 235.

What notice to appear on documents issued by company.

150. Every such company shall have written or printed, immediately after or under its name, wherever such name is used by the company or by any director, officer, servant or employee thereof, and shall have engraved upon its seal the words "NO PERSONAL LIABILITY"; and upon every share certificate issued by the company, distinctly written or printed in red ink, where such share certificates are issued in respect of shares subject to call, the words "SUBJECT TO CALL"; or, if in respect to shares not subject to call, the words "NOT SUBJECT TO CALL," according to the fact. 2 Geo. V. c. 31, s. 148.

Sale of shares on non-payment of calls.

151.—(1) In the event of any call on shares of such a company remaining unpaid by the holder thereof for a period of sixty days after notice and demand of payment, such shares may be declared to be in default, and the secretary of the company may advertise such shares for sale at public auction to the highest bidder for cash by giving notice of such sale in a newspaper published at the place where the principal office of the company is situate, or if no newspaper is published there, then in a newspaper published at the nearest place to such office, once a week for four successive weeks.

Notice of sale.

Contents of.

(2) The notice shall contain the numbers of the share certificates in respect of such shares and the number of shares, the amount of the call or calls due and unpaid and the time and place of sale.

Service and publication.

(3) In addition to the publication of the notice, it shall be personally served upon such shareholder or sent to him by registered post addressed to him at his last known place of abode.

(4) If the holder of such shares fails to pay the amount due thereon, with interest and the cost of advertising, before the time fixed for such sale, the secretary shall proceed to sell the same, or such portion thereof as shall suffice to pay such calls together with interest and the cost of advertising and of the sale. Sale in default of payment.

(5) If the price of the shares so sold exceeds the amount due with interest and costs, the excess shall be paid to the defaulting shareholder on demand. 2 Geo. V. c. 31, s. 149. Surplus of proceeds.

(6) In lieu of proceeding to sell under the preceding sub-sections, the company may maintain an action for the sale of the shares in the Supreme Court and process in such action may be served upon a shareholder resident out of the jurisdiction in the same manner and subject to the same condition as process is permitted to be served out of the jurisdiction in cases provided for by the Consolidated Rules. Action for sale of shares on non-payment of calls.

(7) When there is any question raised as to the validity of a call or as to the right to sell, an action may be brought in the Supreme Court for the purpose of determining the validity of the call and the right to sell, and process in such action may be served on a shareholder resident out of the jurisdiction as provided in sub-section 6. 8. Geo. V. c. 20, s. 30. Action to determine right to sell.

Section 151 was recently considered in *Superior Copper Co., Ltd.* v. *Perry and Sutton* (1919), 17 O. W. N. 90. See also *Superior Copper Co., Ltd.* v. *Perry* (1918), 42 O. L. R. 45; *Superior Copper Co., Ltd.* v. *Perry and Sutton* (1918), 44 O. L. R. 24.

152.—(1) A company which acts in contravention of any provision of this Part, and every director, manager or officer thereof shall incur a penalty of $200. Penalty.

(2) A director or manager or officer who proves that he was not a party or privy to the act, and that when he became aware of it he forthwith gave notice thereof to the Provincial Secretary, shall not be liable to the penalty imposed by this section. 2 Geo. V. c. 31, s. 150. Relief from penalty.

PART XI. A.

This part applies to co-operative companies, and the topic not being one of general interest, the sections are not set out. Co-operative companies.

Part XII.

PART XII.

COMPANIES OPERATING MUNICIPAL FRANCHISES AND PUBLIC UTILITIES.

This part deals with public utility corporations.

PART XIII.

WINDING-UP OF COMPANIES.

This part deals with the voluntary winding-up of companies and the winding-up of companies under order of the court. The sections follow the Imperial Act of 1908, ss. 182 and following.

Up to the present time the provisions of this part have not been sufficiently made use of to warrant the sections being set out and annotated. For a discussion of the corresponding sections of the Imperial Act, see Buckley, 9th ed., pp. 418 and following.

PART XIV.

GENERAL PROVISIONS.

Varying powers or obligations of existing corporations affected by repeal of former enactments.

207.—(1) The Lieutenant-Governor in Council may by Supplementary Letters Patent, upon the application of a corporation or of a shareholder, a creditor or a holder of bonds, debentures, debenture stock, or other securities or obligations thereof, or of any person with whom the corporation may have dealings, relieve the corporation from any duty, obligation or other disability which may have been imposed, or may limit any right, power or other advantage which may have been conferred upon the corporation by the repeal of the general Act under which it was incorporated and by the enactment of *The Ontario Companies Act* (1907) or of *The Ontario Companies Act* (1912) or of this Act.

7 Edw. VII. c. 34, 2 Geo. V. c. 31.

Publication of the change.

(2) Notice shall thereupon be given by the Provincial Secretary of such Supplementary Letters Patent in the *Ontario Gazette*, setting out the manner in which any such duty, obligation or other disability has been relieved or in which such right, power or other advantage has been limited. 2 Geo. V. c. 31, s. 205.

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Application of Act.

208.—(1) This Act, except in so far as it is otherwise expressly declared, shall apply to:

(*a*) Every company incorporated under any special or general Act of the Parliament of the late Province of Upper Canada;

(*b*) Every company incorporated under any special or general Act of the Parliament of the late Province of Canada which has its head office and carries on business in Ontario, and which was incorporated with objects or purposes to which the authority of this Legislature extends;

(*c*) Every corporation incorporated under any of the Acts repealed by *The Ontario Companies Act* (1907), or under any Act for which any of such repealed Acts was substituted or to which any of such Acts was applicable; 7 Edw. VII. c. 34.

(*d*) Every company incorporated under a special Act to which any of the provisions of *The Ontario Joint Stock Companies' General Clauses Act* or any Act for which that was substituted was applicable; R.S.O. 1897, c. 189.

(*e*) Every corporation incorporated under this Act or under *The Ontario Companies Act* (1907), or *The Ontario Companies Act* (1912). (*See* 2 Geo. V. c. 17, s. 50.) 7 Edw. VII. c. 34. 2 Geo. V. c. 31.

(*f*) Every company incorporated under any general or special Act of this Legislature except a company incorporated for the construction and working of a railway, incline railway or street railway, the business of insurance except as provided by *The Ontario Insurance Act*, and the business of a corporation within the meaning of *The Loan and Trust Corporations Act*, except as provided by that Act. Rev. Stat. c. 183. Rev. Stat. c. 184.

Proviso.

(2) The Lieutenant-Governor in Council may relieve any company incorporated before the first day of July, 1907, from compliance with any of the provisions of this Act. 2 Geo. V. c. 31, s. 206.

Recovery of penalties.

209. Where not otherwise provided the penalties imposed by or under the authority of this Act shall be recoverable under *The Ontario Summary Convictions Act*. 2 Geo. V. c. 31, s. 207. Rev. Stat. c. 90.

General corporate powers of certain companies.

210. Every corporation or company heretofore or hereafter created,

(*a*) By or under any special or general Act of the Parliament of the late Province of Upper Canada;

(*b*) By or under any special or general Act of the Parliament of the late Province of Canada, which has its head office and carries on business in Ontario, and which was incorporated with objects or purposes to which the authority of this Legislature extends;

Sect. 209.

(*c*) By or under any of the Acts repealed by *The Ontario Companies Act,* 1907, or under any Act for which any of such repealed Acts was substituted or to which any of such Acts was applicable;

(*d*) By or under a Special Act to which any of the Provisions of *The Ontario Joint Stock Companies General Clauses Act* or any Act for which that was substituted were applicable.

(*e*) By or under any general or Special Act of this Legislature,

shall, unless otherwise expressly declared in the Act or Instrument creating it, have, and be deemed from its creation to have had, the general capacity which the Common Law ordinarily attaches to corporations created by Charter. 6 Geo. V. c. 35, s. 6.

Sub-section (*e*) was considered in *Diebel* v. *Stratford Improvement Co.* (1916), 37 O. L. R. 492. In the same case on appeal in (1916-17), 38 O. L. R. 407, no opinion was expressed on the sub-section.

See also *Edwards* v. *Blackmore* (1918), 42 O. L. R. 105, and the notes to ss. 28 and 29 of the Dominion Act, *supra,* at page 91.

SCHEDULE.

Forms.

Forms 1, Petition for incorporation with share capital; 2, Memorandum of agreement and stock book; and 3, Petition for incorporation without share capital are obtainable from the Department. In the case of incorporation without share capital, it will usually be found convenient to file a memorandum of agreement excluding the statutory Form 4. The Department supplies a short form excluding the statutory provisions.

Form 5. Statement in lieu of prospectus is obtainable from the Department.

There is no Departmental form of prospectus, but the Department supplies the form of statutory declaration required under section 114 (1) (*c*).

The statutory form of proxy, Form 6, is as follows:

Instrument of Proxy. Schedule.

(*Section* 51 (4)).

I, of Company, Limited, a shareholder of Company, Limited, hereby appoint of (*naming the proxy*) as my proxy to vote for me and on my behalf at the meeting of the company, to be held on the day of , 19 , and at any adjournment thereof.

Dated this day of , 19 .

Note.—

(1) Where the appointer is a corporation or an officer of it the necessary changes must be made in the form.

(2) Where the instrument is signed by a corporation its common seal must be affixed. 2 Geo. V. c. 31, Form 6.

The following are the Departmental instructions as to licenses in mortmain under the Mortmain and Charitable Uses Act; as to licenses to extra-provincial corporations and as to obtaining supplementary license increasing capital to be used in Ontario, under the Ontario Extra-Provincial Corporations Act.

Licenses in Mortmain.

Departmental instructions.

Under the provisions of The Mortmain and Charitable Uses Act land shall not be assured to or for the benefit of, or acquired by or on behalf of any corporation in mortmain, otherwise than under the authority of a license from His Majesty, or of a statute for the time being in force, and if any land is so assured, otherwise than as aforesaid, the land shall be forfeited to His Majesty from the date of the assurance, and His Majesty may enter on and hold the land accordingly. The Lieutenant-Governor in Council, if and when, and in such form as he thinks fit, may grant to any person

Departmental instructions for obtaining license in mortmain.

or corporation a license to assure land in mortmain in perpetuity or otherwise, and may grant to any corporation a license to acquire land in mortmain, and to hold such land in perpetuity or otherwise.

The application must be by petition of the corporation addressed to the Lieutenant-Governor in Council and executed by the proper officers of the corporation, under the corporate seal.

This petition must state material facts, such as:—

1. The name of the Kingdom, Dominion, State, Province, or other jurisdiction, under the laws of which the applicant corporation was incorporated and is working;

2. Its corporate name, which must not contain the words "Loan," "Mortgage," "Trust," "Trusts," "Investment," or "Guarantee";

3. That the corporate name of the corporation is not on any public ground objectionable, and that it is not that of any known company, incorporated or unincorporated, or of any partnership or individual doing business in Ontario, or a name under which any known business is being carried on in Ontario, or so nearly resembling the same as to deceive;

4. The date and manner of its incorporation;

5. The place where its head office is situated;

6. Whether its existence is limited by statute or otherwise, and if so, the period of its existence yet to elapse, and whether its existence may be lawfully extended;

7. Whether it is a valid and subsisting corporation;

8. Whether it has capacity to hold land, and if so, the conditions, if any, under which such land is to be held;

9. A description of the land which it desires to hold in Ontario;

10. That the corporation has authorized the making of the application and has duly appointed an attorney for service of process.

11. The name in full, description and place of residence of such Attorney; and

12. Such further and other information as the Provincial Secretary may require.

The contents of, the signatures to, and the impression of the corporate seal upon the petition, must be verified by affidavit or statutory declaration.

If the application be on behalf of a corporation incorporated under the laws of the Dominion of Canada, a copy of its Letters Patent, or of the Act incorporating it, certified by the Deputy Registrar-General or by the Clerk of the Parliaments, respectively, must be produced with the application. A similar observation will apply to a corporation incorporated under the laws of any of the Provinces of the Dominion of Canada, regard being had to the proper officers in that behalf for the purposes of certification.

If the application be on behalf of a corporation incorporated under the laws of Great Britain and Ireland, the copy of the Memorandum and Articles of Association produced must be certified to be a true copy by the Registrar of Joint Stock Companies at London, Edinburgh, or Dublin, as the case may be.

If the application be on behalf of a corporation incorporated under the laws of one of the United States of America, the evidence of incorporation must consist of a duly certified copy of the papers originally and (if any) subsequently filed in the Department of the Secretary of State, or other proper officer having the custody of the papers, and duly verified by such officer.

There should also be evidence that the copies of the creating instruments filed, or of amendments thereto, are true and correct copies of all records affecting the status of the company or varying the terms of its original incorporation.

A person resident in Ontario, or a company having its head office in the Province, must be appointed by the applicant corporation to be its Attorney and representative in Ontario, and a Power of Attorney duly executed for the purpose under the seal of the corporation must be transmitted with the papers. This is required even when the corporation is incorporated under the laws of the Dominion, and has its head office in Ontario. The power itself may contain any provi-

Licenses in mortmain—Departmental instructions.

sions not inconsistent with the duties of the Attorney to be exercised under the laws of the Province, but it must include words expressly authorizing the Attorney:—

> "To act as such, and to sue and be sued, plead and be impleaded in any Court in Ontario, and generally on behalf of the corporation and within Ontario, to accept service of process, and to receive all lawful notices, and, for the purposes of the corporation to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the Power of Attorney."

The power must also provide that until due lawful notice of the appointment of another and subsequent attorney has been given to *and accepted* by the Provincial Secretary, service of process or of papers and notices upon the person or company mentioned in the original or other power last filed with the Provincial Secretary shall be accepted by the applicant corporation as sufficient service in the premises.

The consent of the Attorney to act as such, with an affidavit or declaration verifying the execution of the same, must be filed.

Fees.

When the authorized capital of an applicant corporation is $40,000 or less, the fee shall be $100;

When the authorized capital is more than $40,000, but does not exceed $100,000, the fee shall be $100 and $1 for every $1,000 or fractional part thereof in excess of $40,000;

When the authorized capital is more than $100,000, but does not exceed $1,000,000, the fee shall be $160 and $2.50 for every $10,000 or fractional part thereof in excess of $100,000;

When the authorized capital is more than $1,000,000 the fee shall be $385 for the first $1,000,000 and $2.50 for every $10,000 or fractional part thereof in excess of $1,000,000.

Licenses to Extra-Provincial Corporations.

Departmental instructions.

The application must be by petition of the corporation addressed to the Lieutenant-Governor in Council and executed by the proper officers of the corporation under the corporate seal.

The petition must state material facts, such as:—

1. The name of the Kingdom, Dominion, State, Province or other jurisdiction under the laws of which the applicant corporation was incorporated and is working;

2. Its corporate name, which must not contain the words "Loan," "Mortgage," "Trust," "Trusts," "Investment" or "Guarantee" in connection or in combination with any of the words "Corporation," "Company," "Association," or "Society," or in combination or connection with any similar collective term, nor the word "Imperial," or other title signifying Royal or Government support or patronage, such as "Crown," "King's," "Queen's," etc., unless there is some real Imperial Crown connection which gives a well-founded claim to recognition, and unless it can be shown on clear evidence that there is a long and *bona fide* user, and that the name is so used as not to convey any suggestion of Government support or patronage;

3. That the corporate name is not objectionable upon any public ground, and that it is not that of any known corporation or association, incorporated or unincorporated, or of any partnership or individual doing business in Ontario, or a name under which any known business is being carried on in Ontario, or so nearly resembling the same as to deceive;

4. The date and manner of its incorporation;

5. The place where its head office is situated;

6. Whether its existence is limited by Statute or otherwise, and if so, the period of its existence yet to elapse, and whether its existence may be lawfully extended;

7. Whether it is a valid and subsisting corporation;

Departmental instructions.

8. Whether it has capacity to hold land, and if so, the conditions, if any, under which such land is to be held;

9. Whether it has capacity to carry on business in Ontario;

10. Its authorized powers set out in full;

11. The powers which it desires to exercise in Ontario;

12. The amount of its authorized capital, and whether such capital is divided into shares, and if so, how;

13. The amount of its subscribed capital;

14. The amount of its paid-up capital;

15. The amount of capital which the corporation desires authority to use in Ontario;

16. Its head office, or other chief place of business in Ontario;

17. The name, description and place of residence of its chief agent or representative in Ontario;

18. That the corporation has authorized the making of the application and has duly appointed an attorney for service of process;

19. The name, description and place of residence of such attorney; and

20. Such further and other information as the Provincial Secretary may require.

The contents of, the signatures to, and the impression of the corporate seal upon the petition must be verified by affidavit or statutory declaration.

If the application be on behalf of a corporation incorporated under the laws of any of the Provinces of the Dominion of Canada, a copy of its Letters Patent, certified by the Secretary of such Province or other proper officer having the custody of the papers, and duly verified by such officer, must be produced with the application.

If the application be on behalf of a corporation incorporated under the laws of Great Britain and Ireland, the copy of the Memorandum of Articles of Association produced must be certified to be a true copy

by the Registrar of Joint Stock Companies at London, Edinburgh or Dublin, as the case may be.

If the application be on behalf of a corporation incorporated under the laws of one of the United States of America, the evidence of incorporation must consist of a duly certified copy of the papers originally and (if any) subsequently filed in the Department of the Secretary of State, or other proper officer having the custody of the papers, and duly verified by such officer.

Evidence should be filed that the copies of the creating instruments filed, or of amendments thereto, are true and correct copies of all records affecting the status of the corporation or varying the terms of its original incorporation.

A person resident in Ontario, or a company having its head office in the Province, must be appointed by the applicant corporation to be its attorney and representative in Ontario, and a power of attorney duly executed for the purpose under the seal of the corporation must be transmitted with the papers. This is required even when the corporation is incorporated under the laws of the Dominion, and has its head office in Ontario. The power itself may contain any provisions not inconsistent with the duties of the attorney to be exercised under the laws of the Province; but it must include words expressly authorizing the attorney;

> "To act as such, and to sue and be sued, plead and be impleaded in any Court in Ontario, and generally on behalf of the corporation and within Ontario to accept service of process, and to receive all lawful notices, and, for the purposes of the corporation to do all acts, and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney."

The power of attorney must also provide that until due lawful notice of the appointment of another and subsequent attorney has been given to *and accepted* by the Provincial Secretary, service of process or of

papers and notices upon the person or company mentioned in the original or other power last filed with the Provincial Secretary shall be accepted by the applicant corporation as sufficient service in the premises.

The consent of the attorney to act as such, with an affidavit or declaration verifying the execution of the same, must be filed.

Memorandum Outlining Procedure for Supplementary License Increasing Capital to be used in Ontario.

Departmental instructions.

The application must be by petition to the Lieutenant-Governor in Council, executed by the corporation under its corporate seal.

This petition should state material facts, such as:

1. The name of the State under the laws of which the corporation was incorporated, and is working;

2. Whether it is a valid and subsisting corporation;

3. The date of its license to carry on business in the Province of Ontario;

4. The amount of capital which the corporation is authorized to use in Ontario.

5. Its head office or other chief place of business in Ontario;

6. The additional amount of capital which the company desires to be empowered to use in Ontario.

7. The extended powers which the corporation desires to exercise in Ontario;

8. That the status of the corporation has not changed since the original license was granted. If the corporate status has been altered, then a certified copy of the amendments filed in the Department of the Secretary of State, or other proper office having custody of the papers, and duly verified by such officer, should be filed with the petition.

The contents of, the signatures to, and the impression of the seal upon the petition, must be verified by affidavit.

DOMINION WINDING-UP ACT.

Sect. 1.

R. S. C. (1906) CHAPTER 144.

An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies, and Trading Corporations.

Short Title.

1. This Act may be cited as the Winding-up Act, R. S., c. 129, s. 1. Short title.

This Act is *intra vires* of the Dominion Parliament, being in the nature of an insolvency law: *Shoolbred* v. *Clark* (1890) 17 S. C. R. 265; and the Dominion Parliament is alone competent to enact such legislation: B. N. A. Act, s. 91, No. 21. See *A.-G. for Dominion of Canada* v. *A.-G. for Province of Ontario* (1898), A. C. 700, at p. 715. Provincial legislation affecting insolvent persons and corporations is valid as falling under the heading "Property and Civil Rights," even though of such a nature that it would be a suitable ancillary provision to a bankruptcy law, provided it does not come within s. 91 of the B. N. A. Act: *A.-G. of Canada* v. *A.-G. of Ontario* (1894), A. C. 189.

A provincial Act passed to relieve a particular society which is shown on the face of the Act to be in a state of financial embarrassment, is *intra vires* as coming within s. 92: *L'Union St. Jacques* v. *Belisle* (1874-5), L. R. 6 P. C. Appeals 31.

It has been held that a provincial statute providing for the sale of provincially subsidized railway when it is insolvent or has not complied with its charter or ceases to carry on its undertaking, applies to a company which is subjected to the legislative jurisdiction of the Dominion: *Baie des Chaleurs* v. *Nantel* (1896), Q. R. 9 S. C. 47; (1896) Q. R. 5 Q. B. 64.

THE BANKRUPTCY ACT.

The Bankruptcy Act passed in 1919 and being chapter 36 of the Dominion statutes of that year, is to go into force on July 1, 1920.

Sect. 1.

Bankruptcy Act.

The new Act is made applicable to corporations, excepting building societies having a capital stock, incorporated banks, insurance companies, trust companies, loan companies or railway companies (s. 2 (k)). Companies of the foregoing classes will continue to be subject to the Winding-up Act and not to the Bankruptcy Act. As regards other companies the Bankruptcy Act provides (s. 2 (o)), that the Winding-up Act shall not apply; but all proceedings instituted under the Winding-up Act before the Bankruptcy Act comes into force are to be continued under the Winding-up Act.

The intention of the framers of the Bankruptcy Act apparently is that the machinery for the liquidation of insolvent companies under the Act is to be provided by General Rules made pursuant thereto. And section 66, sub-sec. (2) of the Bankruptcy Act provides as follows:—

'Such rules shall not extend to the jurisdiction of the court, save and except that, for the purpose of enabling the provision of rules having application to corporations, but for such purposes only, the Winding-up Act, chapter 144 of the Revised Statutes of Canada, shall be deemed part of this Act.'

The Winding-up Act furthermore remains in full force and is applicable for the winding-up of companies subject to its provisions on grounds other than insolvency.

Interpretation.

Definitions.

2. In this Act, unless the context otherwise requires,—

'Minister.' (*a*) 'Minister' means the Minister of Finance;

'Company.' (*b*) 'company' includes any corporation subject to the provisions of this Act;

'Insurance company.' (*c*) 'insurance company' means a company carrying on either as a mutual or stock company, the business of insurance, whether life, fire, marine, ocean or inland marine, accident, guarantee or otherwise;

'Trading company.' (*d*) 'trading company' means any company, except a railway or telegraph company, carrying on business similar to that carried on by apothecaries, auctioneers, bankers, brokers, brickmakers, builders, carpenters, carriers, cattle or sheep salesmen, coach proprietors, dyers, fullers, keepers of inns, taverns, hotels, saloons or coffee houses,

lime burners, livery stable keepers, market gardeners, millers, miners, packers, printers, quarrymen, share-brokers, ship-owners, shipwrights, stockbrokers, stock-jobbers, victuallers, warehousemen, wharfingers, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment or otherwise, in gross or by retail, or by persons who, either for themselves, or as agents or factors for others, seek their living by buying and selling or buying and letting for hire goods or commodities, or by the manufacture, workmanship or the conversion of goods or commodities or trees;

'Court.'

(*e*) 'court' means,

(i) in the province of Ontario, the Supreme Court of Ontario (6 & 7 Geo. V., c. 5, s. 1).

(ii) in the province of Quebec, the Superior Court.

(iii) in the province of Nova Scotia, the Supreme Court.

(iv) in the province of New Brunswick, the Supreme Court,

(v) in the province of Manitoba, the Court of King's Bench.

(vi) in the province of British Columbia, the Supreme Court.

(vii) in the province of Prince Edward Island, the Supreme Court.

(viii) in the province of Saskatchewan, the Supreme Court (9 & 10 Ed. VII., c. 62, s. 1).

(ix) in the province of Alberta, the Supreme Court (9 & 10 Ed. VII., c. 62, s. 1).

(x) in the Northwest Territories, such court or magistrate or other judicial authority as is designated, from time to time, by proclamation of the Governor in Council, published in the *Canada Gazette*, and

(xi) in the Yukon Territory, the Territorial Court;

'Official Gazette.'

(*f*) 'official gazette' means the *Canada Gazette* and the gazette published under the authority of the government of the province where the proceedings for the winding-up of the business of the company are carried on, or used as the official means of communication between the Lieutenant-Governor and the people, and if no such gazette is published, then it means any newspaper published in the province, which is designated by the court for publishing the notices required by this Act;

'Contributory.'

(*g*) 'contributory' means a person liable to contribute to the assets of a company under this Act; and, in all proceedings for determining the persons who are to be deemed contributories and in all proceedings prior to the final determination of such persons, it includes any person alleged to be a contributory;

Sect. 2.

'Winding-up order.'

(*h*) 'winding-up order' means an order granted by the court under this Act to wind up the business of the company, and includes any order granted by the Court to bring within the provisions of this Act any company in liquidation or in process of being wound up;

'Capital stock.'

(*i*) 'capital stock' includes a capital stock *de jure* or *de facto;*

'Creditor.'

(*j*) 'creditor' includes all persons having any claim against the company present or future, certain, ascertained, or contingent, for liquidated or unliquidated damages; and in all proceedings for determining the persons who are to be deemed creditors it shall include any person making any such claim. R. S., c. 129, ss. 2, 33, 56 and 61; 62-63 V., c. 43 s. 5.

Company.

(b) The Act is valid as regards an insolvent provincial company: *Shoolbred* v. *Clark,* [1890] 17 S. C. R. 265; or a foreign company: *Allen* v. *Hanson* (1890), 18 S. C. R. 667. See further notes to s. 6.

Trading company.

(d) In ascertaining whether a company is a 'trading company' apparently it is sufficient if any of the objects bring it within the sub-section: *Re Lake Winnipeg, &c., Co.* (1891), 7 Man. L. R. 255, at p. 259; *Re Canadian General Service Corporation* (1914), 16 D. L. R. 15. Whether the company has actually exercised the powers which bring it within the definition is immaterial: *Re Anchor Investment Co.* (1912), 7 D. L. R. 915.

Under the term 'trading company' will be included a gas manufacturing company: *Delorimer* v. *Canadian Gas & Oil* (1908), Q. R. 34 S. C. 381; but not a social club: *Re Montreal City Club* (1895), 8 R. J. Q. (S.C.) 527; *Re St. James Club* (1852), 2 D. M. & G. 383; nor a literary society: *Re British Athenaeum* (1890), 43 Ch. D. 236.

Court.

(e) In Quebec 'The Superior Court' means the court for the district where the head office of the company is situate: *Dupont* v. *Compagnie de Moulin* (1885), 11 L. N. 225.

The jurisdiction of the court is analogous to the jurisdiction in administration actions: *Stringer's Case* (1869), L. R. 4 Ch. 493; *Rance's Case* (1871), L. R. 6 Ch. 104.

Sect. 2.

A local judge of the Supreme Court in British Columbia has no jurisdiction to make a winding-up order under the Act: *Re Kootenay Brewing Co.* (1900), 7 B. C. R. 131.

The decisions under the Act in one province are not binding on the Courts of another province: *Re Central Bank* (1888), 30 C. L. T. 271.

Contributory.

(g) The definition of the term contributory in this section is taken from the Imperial Companies Act, 1862, s. 74. It does not include a mere debtor who is a stranger to the company, but only a shareholder or member: *In re Central Bank, Yorke's Case* (1888), 15 O. R. 625. This limitation on the meaning of the term 'contributory' is apparent from other sections of the Act, e.g., 51, 52, 60, 61 and 62. Section 51 providing for the liability of contributories is limited in its application to the liability of a member or shareholder in his character as such. Thus a holder of bonus shares, who has transferred them to a person who has been accepted by the company as transferee and who is entitled to hold them as fully paid, is not liable to be placed on the list of contributories so as to be liable to contribute qua shareholder: *In re Wiarton Beet Root Sugar Company* (1906), 12 O. L. R. 149; *In re Winnipeg Hedge Wire Fence Company, Limited* (1912), 1 D. L. R. 316. In the first mentioned case it was held, however, that if the transferor was a director he would be liable for breach of trust if he was a party to the allotment of the shares fully paid, and also for transferring them as fully paid shares to the prejudice of the company, and was caught by s. 123: In *Re Winnipeg Hedge Wire Fence Company, Limited* supra, Robson, J., at p. 323, expressed the view that s. 123 could not be invoked on an application to settle a list of contributories.

See also the following cases:—*Tillsonburg Agricultural Co.* v. *Goderich*, (1885), 8 O. R. 565; *In re London Speaker Co.* (1889), 16 A. R. 508; *Re Standard Fire Insurance Co.* (1885), 7 O. R. 448, 12 S. C. R. 644; *Re Cole & Canada Fire and Marine Insurance Co.* (1885), 8 O. R. 92.

Sect. 2.

A shareholder may be placed on the list of contributories even though he has paid for his shares in full; *In re Anglesea Colliery Co.* (1886), L. R. 1 Ch. 555, followed in *Re Monarch Bank of Canada,* (1914), 32 O. L. R. 213, where a fully paid subscriber was placed on the list for the purpose of entitling him to claim in the distribution of the surplus remaining after the creditors of the bank had been paid.

Company deemed insolvent, when.

3. A company is deemed insolvent,—

(*a*) if it is unable to pay its debts as they become due;

(*b*) if it calls a meeting of its creditors for the purpose of compounding with them;

(*c*) if it exhibits a statement showing its inability to meet its liabilities;

(*d*) if it has otherwise acknowledged its insolvency;

(*e*) if it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of, any of its property, with intent to defraud, defeat or delay its creditors, or any of them;

(*f*) if with such intent, it has procured its money, goods, chattels, land or property to be seized, levied on or taken under or by any process of execution;

(*g*) if it has made any general conveyance or assignment of its property for the benefit of its creditors or if, being unable to meet its liabilities in full, it makes any sale or conveyance of the whole or the main part of its stock in trade or assets, without the consent of its creditors, or without satisfying their claims; or,

(*h*) if it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure. R. S., c. 129, s. 5.

When company deemed insolvent.

The provisions of ss. 3 and 4 of the Act are exclusive, and the petitioner must strictly prove the existence of one or more of the circumstances there set forth or his petition will be dismissed: *Re Rapid City Farmers' Elevator Co.,* (1894), 9 Man. R. 574.

Sub-section (a).

Unable to pay its debts.

A creditors' winding-up petition is a mode of execution which the Court gives a creditor against a company unable to pay its debts: *Re Company for*

General Promotion of Land Credit, (1870), L.R. 5 Ch. 380; *Re National Permanent Benefit Building Society, ex p. Williamson*, (1869), L. R. 5 Ch. 312.

In Manitoba it has been held by Taylor, C. J., that s. 3 (a) and s. 4 are to be read together, that s. 4 defines what "unable to pay its debts" means, and that a petitioning creditor who seeks to show insolvency within s. 3 (a) can only succeed by proceeding in the manner provided in s. 4: *Re Rapid City, &c., Co.*, (1894), 9 Man. R. 574; *Re Qu'Appelle Valley Co.*, (1888) 5 Man. R. 160; *Re Catholic Publishing Co.*, (1864), 2 D. J. & S. 116. The cases in Ontario are to the same effect: *Re Briton Medical* (1886), 11 O. R. 478; *In re Ewart Carriage Works Ltd.*(1904), 8 O.L.R. 527. In the last mentioned case the petitioner was given leave to amend, offer additional evidence and again present his petition within fourteen days. These cases have been followed in British Columbia; *Re Anchor Investment*, (1912), 7 D. L. R. 915; as to the province of New Brunswick see *In re Cushing*, (1904-06), 37 N. B. R. 254 at p. 302.

In Quebec it has been held that insolvency being alleged in the petition the petitioning creditor is not compelled to prove that he demanded payment from the company conformably to s. 4: *McKay* v. *L'Association Coloniale de Construction* (1884), 13 R. L. 383, (S.C.) But the petitioner must prove the insolvency otherwise: *Eddy* v. *Henderson*, 6 M. L. R. (S.C.) 137. In Quebec it has also been held that the service of a winding-up petition is equivalent to the service of a demand under s. 4; *Alex Bremner, Ltd.* v. *Dominion Floor and Wall Tile Co.* (1915), 17 Que. P. R. 278.

The English Courts have held a Company unable to pay its debts—

Where the company's acceptances were dishonoured. And no demand is required: *In re Globe New Patent Co.* (1875), L. R. 20 Eq. 337.

Where the creditor was told by company's solicitor there were no assets on which he could levy: *Re Flagstaff Co.* (1875), L. R. 20 Eq. 268; *Re Yate Collieries* (1883), W. N. 171.

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Company unable to pay its debts.

"Unable to pay its debts" means inability to pay debts absolutely as they become due, that is debts which the creditor may demand to be paid instantly: *Re European Life Assurance Society* (1869), 39 L. J. Ch. (N.S.) 324. This does not mean *demanded* but *demandable: Re Bristol Joint Stock Bank* (1890) 38 W: R. 576.

In Rapid City, &c., Farmer's Elevator Co., (1894), 9 M. R. 576, Taylor C. J., distinguishes these cases on the ground that the Dominion Winding-up Act contains no clause corresponding to s. 80, s.-s. 4 of the English Companies Act (1862); cf. *In re Ewart Carriage Works,* (1904), 8 O. L. R. at p. 528.

But a company is not unable to pay its debts because it is carrying on a losing business if its assets exceed its liabilities: *Re Joint Stock Coal Co.* (1869), L. R. 8 Eq. 146: *Re Spence's Patent Non-conducting Composition Co.* (1869), L.R. 9 Eq. 9.

But an allegation that a company is insolvent and unable to pay petitioners' debts is not a sufficient allegation within the meaning of s-s. (*a*) of this Act. *Re Rapid City, &c., Co.* (1894), 9 Man. R. 574.

Sub-section (b).

Meeting of creditors.

It will not be inferred from a letter sent by a company to a creditor which merely stated "have representatives meet the creditors" at a certain time and place, that it was a meeting of the company's creditors for the purpose of compounding with them where there was no account in evidence of what took place at the meeting: *Re Manitoba Commission Co.* (1912), 2 D. L. R. 1.

Sub-section (c).

Exhibiting statement.

This sub-section is *intra vires* of the Parliament of Canada: *Re Lake Winnipeg T. L. and T. Co.* (1891), 7 Man. R. 255, 262.

The liabilities referred to in the sub-section are those to creditors as distinguished from those to shareholders: *United Commercial* (1901-3), 9 B. C. R. 528; *Re Great West Brick and Coal Co., Ltd.* (1915-6),

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9 Sask. L. R. 240. The statement exhibited must be the company's statement. Thus where the company's president threw open the books of the company to an accountant employed by a creditor, and the accountant made a report to the creditors showing the company insolvent, these facts were held not to bring the company within the sub-section for the acts of the accountant were not those of the company: *Re Manitoba Commission Co.* (1912), 2 D. L. R. 1.

Where a petition is filed under the sub-section the statement must be taken as correct and can not be attacked by the petitioner: *United Commercial* (1901-3), 9 B. C. R. 528.

Sub-section (d).

Otherwise acknowledges its insolvency.

As a matter of pleading where it is intended to rely upon an acknowledgment of insolvency such acknowledgment must be stated and set forth in the petition: *Re Briton Medical Association* (1886), 11 O. R. 478; see also *In re Ewart Carriage Works* (1904), 8 O. L. R. 527, 529.

Insolvency is a condition in which a debtor is placed when he has not sufficient property subject to execution to pay all his debts if sold under legal process at a sale fairly and reasonably conducted: *Dominion Bank* v. *Cowan* (1888), 14 O. R. 465, 466.

The acknowledgment must be 'some formal act of the directors or of the shareholders or of some officer expressly or impliedly authorized to make such an acknowledgment on the company's behalf': *Re Manitoba Commission Co.* (1912), 2 D. L. R. 1, per Mathers, C. J., at p. 7. It must be a corporate act: *In re Atlas Canning Co.* (1895-97), 5 B. C. R. 661. Thus a resolution passed by the directors to the effect that the creditors be notified and requested to file claims with a trustee for pro rata payment followed by notification to the creditors is sufficient: *Re Anchor Investment Co.* (1912), 7 D. L. R. 915.

The fact that the company has not paid the debt, has allowed itself to be sued, judgment to be recovered and execution returned *nulla bona*, is not an

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acknowledgment of insolvency within the sub-section: *Re Qu'Appelle Valley Co.* (1888), 5 Man. R. 160; nor are affidavits of the company's officers to the effect that the company is insolvent, not giving a statement of assets and liabilities, sufficient, *ibid;* see also *Re Great West Brick & Coal Co.* (1915-6), 9 Sask. L. R. 240. Nor is failure to appear and oppose the petition enough: *Re Lake Winnipeg T. L. & T. Co.* (1891), 7 Man. R. 255; nor admission by counsel, for the material filed must bring the case within the section: Re *Grundy Stove Co.* (1904), 7 O. L. R. 252.

Where the insolvency was admitted the company was ordered to be wound up, though a voluntary assignment had previously been made: *Re William Lamb Mfg. Co.,* (1900), 32 O. R. 243.

Sub-section (e).

Assigns, removes, etc., its property.

A winding-up petition, which alleges fraud, e.g., by promoters and directors, must state the facts which constitute the fraud though not the evidence. If there is only a vague general allegation of fraud evidence will not be admitted of particular acts of fraud: *Re Rica Gold Washing Co.* (1879), 11 Ch. D. 43. See also *Re Qu'Appelle Valley Co.* (1885), 5 M. R. 160, 164; and *In re Ewart Carriage Works* (1904) 8 O. L. R. 527.

Where a company which had ceased operations and was so heavily indebted that it could have been put into insolvency, was proceeding to transfer its assets, against the will of dissentient shareholders and creditors, in consideration of the issue of paid-up shares of another company, it was held that the company was brought within sub-section (*e*) as being about to assign some of its property with intent to defraud and delay creditors: *Calumet Metals* v. *Eldredge* (1914), 17 D. L. R. 276.

Sub-section (g).

Makes general assignment.

A company unable to meet its liabilities in full conveyed the main part of its assets to another company without the consent of its creditors, and without satisfying their claims. Held, that a winding-up

order might issue: *Re Qu'Appelle Valley Co.* (1888), 5 Man. R. 160; *Calumet Metals* v. *Eldredge* (1914), 17 D. L. R. 276.

The fact that a company is in voluntary liquidation is *prima facie* evidence of insolvency: *Northampton* v. *Midland Co.* (1878), 7 Ch. D. 500; *Pure Spirit Co.* v. *Fowler* (1895), 25 Q. B. D. 235. The Court may, however, refuse an order in such a case: *Re Strathy Wire Fence Co.* (1904), 8 O. L. R. 186.

In Manitoba it has been decided that a company cannot be deemed to be insolvent within the meaning of the Act because an execution has been returned *nulla bona* by a County Court bailiff: *Re Rapid City, &c.* (1894), 9 M. R. 574; following *Re Qu'Appelle Valley Co.* (1888), 5 M. R. 160.

Sub-section (h).

Permits execution to remain unsatisfied.

In computing the time under this sub-section the day fixed for the sale is exclusive. The writ was in the sheriff's hands on 30th December, and sale was fixed for 3rd January. Held, that this proved insolvency within ss. (*h*): *Re Lake Winnipeg, &c., Co.* (1891), 7 M. R. 255.

Evidence of an actual seizure is necessary: *In re Ewart Carriage Works* (1904), 8 O. L. R. 527, 529; *Rapid City Farmer's Elevator Co.*, 9 Man. L. R. 574; *Re Great West Brick, &c., Co.* (1915-6), 9 Sask. L. R. 240.

See as further illustrations the cases cited in Clarke's Insolvent Acts (1877), pp. 26 to 46, under the sections of the Insolvent Act then in force, as exhibiting the principles of decision laid down by Canadian Courts in respect to analogous enactments.

This sub-section is not affected by s. 4: *Re Installations, Ltd.* (1913), 14 D. L. R. 679.

Company deemed unable to pay its debts.

4. A company is deemed to be unable to pay its debts as they become due, whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due has served on the company, in the manner in which process may legally be served on it in the place where service is made,

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a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank and for sixty days in all other cases next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor. R. S., c. 129, s. 6.

Compare Imperial Companies Act (1862), s. 80.

Company unable to pay its debts.

When the debt was not due when the demand was made, it was held that non-payment was not evidence of insolvency within the meaning of the section: *Re Briton Medical Association* (1886), 11 O. R. 478.

A delay by a creditor (*e.g.* for eight months) in following up a statutory demand is not an implied withdrawal of his demand so as to disentitle him to found a winding-up petition on the Company's non-compliance: *Re Imperial Hydropathic Hotel Co.* (1882), 49 L. T. 147.

The Court's discretion to grant or refuse the order may, however, be affected by the petitioner's delay: *Strathy Wire Fence Co.* (1904), 8 O.L. R. 186 at p. 191.

Service of a specially endorsed writ is not equivalent to the serving of a demand under the Act: *Re Abbott Mitchell* (1901), 2 O. L. R. 143. In Quebec it has been held that service of a winding-up petition is equivalent to the service of a demand: *Alex Bremner, Ltd.* v. *Dominion Floor and Wall Tile Co., Ltd.* (1915), 17 Que. P. R. 278.

"Neglect to pay such sum."

An order for a winding-up is not rendered invalid by the fact that the petitioning creditor demanded payment of a larger sum than was really due, where the company did not offer to pay the sum due: *Cardiff Preserved Coal and Coke Co.* v. *Norton* (1887), L. R. 2 Ch. 410.

Where proof of the inability of the company to pay its debts is rested on non-payment of the debt after notice the whole period mentioned must have expired before the presentation of the petition for winding-up: *Re Catholic Publishing Co.* (1864), 2 D. J. & S. 121.

The Court is bound to treat "neglect" by the company to comply with the statutory demand as conclus-

ive evidence of the company's insolvency: *Re Imperial Hydropathic Hotel Co.* (1882), 49 L. T. 160.

The mere omission, unless without reasonable cause, to comply with a statutory notice for payment of a debt is not 'neglect' to pay within the meaning of the section: *Re London & Paris Banking Corporation* (1874) 19 Eq. 444; but if no reason is given why the payment is not made the company must be deemed insolvent: *Re Cushing Sulphite Fibre Co.* (1904-06) 37 N. B. R. 254.

In proceeding under this section it is not sufficient to shew that several demands of payment have been made by the creditors without success unless a demand in writing has been served on the company in the manner in which process may legally be served on it: *Rapid City Farmers' Elevator Co.* (1894), 9 M. R. 574.

Where petitioning creditor claimed as assignee of a judgment debt, and founded his application under this section, he was held liable to prove not only that the date of the judgment, but also its assignment to him, were prior to his statutory demand: *Rapid City Farmers' Elevator Co.* (1895), 10 M. R. 681.

See also notes to preceding section.

A secured creditor may make the demand under the section: *Re Cushing Sulphite Fibre Co., Ltd.* (1904-06), 37 N. B. R. 254.

5. The Winding-up of the business of a company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding-up. R. S., c. 129, s. 7. Commencement of winding-up.

Compare Imperial Companies Act 1862, s. 84.

The winding-up of the business of a company commences from the time of the service of the notice under this section and therefore under s. 84 a landlord's claim to be paid preferentially for overdue rent after such service is invalid: *Fuches* v. *Hamilton Tribune* (1884), 10 P. R. 409.

See the notes to ss. 13 and 20; see also *Bank of Hamilton* v. *Kramer Irwin* (1912), 1 D. L. R. 476. It is doubtful as was observed in this case whether a

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company could consent to judgment after the service of a petition.

Under the Imperial Act, the time named is the presentation of the petition and the English decisions therefore afford no assistance.

Service of Petition.

Service of petition.

Service of a winding-up petition must be a real, substantial service. Thus, where the company's office had been pulled down and the company had ceased to do business for more than eight years service on a workman employed on the former site was held insufficient: *Re Manchester & London Life Assurance, &c., Association* (1870, L. R. 9 Eq. 643.

If the company's head office is closed, the petition may be left in the letter box, but in such a case it is desirable that the petition should be served on a member of or one of the directors of the company or the company's solicitor: *Re London & Westminster Wine Co.* (1863), 12 W. R. 6.

Where a company had transferred its business and closed its office the Court ordered service of a winding-up petition on any five of the directors: *Re Unity General Assurance Association* (1863), 11 W. R. 355.

Service of a winding-up petition on a person authorized by the directors to accept service, e.g., a solicitor appointed by the company, is sufficient though such service be not at the registered office of the company: *Re Regent United Service Stores* (1878), 8 Ch. D. 75.

Where a company had no known place of business the Court directed service of the petition on the chairman and general manager: *National Credit and Exchange Co.* (1862), 11 W. R. 161.

Service on the vice-president is insufficient: *Kearns Ink, &c., Co.,* Anglin, J. (1907), unreported; so also service on an assignee for the benefit of creditors; *In re Rodney Casket Co.* (1906), 12 O. L. R. 409.

See s. 111 as to service out of the jurisdiction.

Application. Sect. 6.

Application.

6. This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada, or by or under the authority of any Act of the late province of Canada, or of the province of Nova Scotia, New Brunswick, British Columbia or Prince Edward Island, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada; and also to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, and incorporated trading companies doing business in Canada wheresoever incorporated,—

(*a*) which are insolvent; or,

(*b*) which are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators, ask to be brought under the provisions of this Act. R. S., c. 129, s. 3; 52 V., c. 32, s. 3.

The principal discussions under this section have arisen upon questions of the jurisdiction and constitutional powers of the Parliament of Canada in respect to foreign and Provincial companies.

The Dominion Parliament appears to have power to legislate for the winding-up—

First:—Of all companies incorporated under legislation of the Dominion of Canada.

Second:— Of all companies incorporated under legislation of any of the provinces of Canada provided the company is insolvent.

Third:—For the ancillary winding-up of a foreign company and the preservation and distribution of its Canadian assets, provided the company is insolvent and has assets in Canada.

There may be some question whether ss. (*b*) of s. 3 empowers the Court to supersede a provincial or voluntary winding-up in the case of a solvent company incorporated under provincial charter, as such an application of the section might import into it a power *ultra vires* of the Dominion Parliament. The point does not seem to have arisen. In such event the Court would in any case exercise its discretion against granting the order.

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Provincial Companies.

Provincial companies.

A company, though incorporated by a Provincial Legislature, may be put into compulsory liquidation and wound up under this Act if the company is insolvent. The Winding-up Act is in the nature of an insolvency law: *Shoolbred* v. *Clark* (1890), 17 S. C. R. 265; *Re Union Fire Ins. Co.* (1887), 14 O. R. 618; (1890), 16 A. R. 161; (1890), 17 S. C. R. 265; *Re Eldorado Union Store Co.* (1886), 18 N. S. (6 R. & G.) 514; *Re British Columbia Iron Works Co.* (1898), 5 B. C. R. 536.

If a provincially incorporated company is not shown to be insolvent the Act does not apply: *Re Cramp Steel Co., Ltd.* (1908), 16 O. L. R. 230.

A company incorporated under the Companies Act of the Province of Ontario and carrying on business in Ontario, is 'doing business in Canada,' within the meaning of this Act: *Re Ontario Forge and Bolt Co.* (1894) 25 O. R. 407. See *Re British Columbia Iron Works Co., supra.*

Notwithstanding the Act, 52 Vict., c. 32 (Dom.), amending the then Dominion Winding-up Act, the Ontario Winding-up Act, R. S. O. 1897, c. 222, does not apply to a company incorporated in Ontario where application is made to wind up on the ground of insolvency, because local legislatures have no jurisdiction in matters of bankruptcy or insolvency: *Re Iron Clay Brick Manufacturing Co.; Turner's Case* (1889), 19 O. R. 113. See *Macklin* v. *Dowling* (1890) 19 O. R. 441.

Foreign Companies.

Foreign companies.

The Dominion Parliament can, in the exercise of its powers respecting insolvency and bankruptcy, legislate respecting insolvent companies doing business in Canada and with reference to the property of such companies within its jurisdiction: *Allen* v. *Hanson* (1890), 18 S. C. R. 667, 1; *Re Breakwater Co.* (1914), 33 O. L. R. 65.

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The business of a foreign company having assets in Canada may be wound up here although the company is in process of being wound up elsewhere: *Re Stewart Gold Dredging Co.* (1912), 7 D. L. R. 736; *Re Breakwater Co.* (1915), 33 O. L. R. 65.

Canadian policy holders petitioned for distribution of the deposit made by a company, a foreign corporation, with the Minister of Finance, under 31 Vict., c. 48 (Dom.) and 34 Vict., c. 9 (Dom.), the company being insolvent. Held that they were entitled to the relief asked notwithstanding that proceedings to wind up the Company were pending before the English Courts: *Re Briton Medical and General Life Association, Limited* (2) (1886), 12 O. R. 441.

Quaere, whether an order will be made in the case of a foreign company not registered and illegally carrying on business in contravention of local legislation: *Re Nelson Ford Lumber Co.* (1908), 8 W. L. R. 79.

Similarly it has been held in a great number of English cases that foreign companies doing business in England can be wound up there: *Re Mercantile Bank of Australia* (1892), 2 Ch. 204; *Re Matheson Bros. & Co.* (1884), 27 Ch. D. 225; *Re Commercial Bank of S. Australia* (1886), 33 Ch. D. 174; (1887), 36 Ch. D. 522; *Re Federal Bank of Australia* (1893), 37 Sol. J. 341; *Re Commercial Bank of India* (1868), L. R. 6 Eq. 517.

But the English Court refused on grounds of expediency to wind up a banking company formed in India and carrying on business at Calcutta: *Re Union Bank of Calcutta* (1850), 3 De G. & Sm. 253.

The English Court has no jurisdiction to wind up a foreign company carrying on business merely through an agent in England: *Re Lloyd Generale Italiano* (1885), 29 Ch. D. 219.

Where liquidation is sought in Canada with the concurrence of the foreign liquidator and as ancillary to the foreign winding up, the Supreme Court of Canada held that this Act warranted the making of the

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Foreign companies.

order and that the statute is not *ultra vires* of the Canadian Parliament: *Allen* v. *Hanson* (1890), 18 S. C. R. 667, commenting on and partially overruling the following cases:—*Re Steel Company of Canada* (1884), N. S. (5 R. G.) 49; *Merchants' Bank of Halifax* v. *Gillespie* (1885), 10 S. C. R. 312; *Re Halifax Sugar Refinery Company* (1889), 22 N. S. 71.

All the Winding-up Act seeks to do in the case of foreign corporations is to protect and regulate the property in Canada and protect the rights of the creditors of such corporations upon their property in Canada. Although all the provisions of the Act are not applicable to foreign companies, those which are should be acted upon: *Allen* v. *Hanson, supra.*

In *Re Breakwater Co.* (1914), 33 O. L. R. 65, Middleton, J., however, held that once the winding-up order is made the provisions of the Act apply and control the whole situation; that the winding-up order under the Act is in no sense ancillary to the proceedings in the foreign Court, but is an independent and self-contained proceeding. It was also held that it was the duty of the Canadian liquidator to distribute the Canadian funds, and that he could not discharge himself by remitting them to the foreign liquidator. In *Allen* v. *Hanson, supra,* Strong, J., at p. 674 appears to have taken a somewhat different view of the nature of the proceedings and of the duties of the Canadian liquidator. See also *Re Stewart & Matthews, Ltd.* (1916), 26 Man. L. R. 277.

The following have been ordered to be wound up:

Companies ordered to be wound up.

Companies incorporated by a Royal charter: *Bank of Australia* (1895), 1 Ch. 578.

Companies incorporated by Special Act: *Borough of Portsmouth Tramways Co.* (1892) 2 Ch. 362.

A tram company incorporated by a special Act may be wound up, not being a railway company: Re *Brentford and Isleworth Tramways Co.* (1884), 26 Ch. D. 527; *Re Borough of Portsmouth Tramways Co.* (1892), 2 Ch. 362.

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The Court will be most cautious about winding up a company, in the nature of a public undertaking, which the legislature has declared to be of great public benefit: *Re Fraternity of Free Fishermen* (1887), 36 Ch. D. 329; *Re Exmouth Docks* (1873), 17 Eq. 188. See *contra Re Barton-upon-Humber, &c., Co.* (1889), 42 Ch. D. 585; *Re Borough of Portsmouth Tramways Co., supra.*

A social club is not an association or a trading company within the Winding-up Act: *Re Montreal City Club* (1895), 8 R. J. Q. (S.C.) 527; *Re St. James' Club* (1852), 2 D. M. & G. 383; *Langevin* v. *The Stadium Co.* (1917-8), 19 Que. P. R. 245; *Durocher* v. *Club Champêtre* (1917-8), 19 Que. P. R. 175. A club which has only subsidiary powers to do certain acts of a commercial nature is not a commercial company: *Langevin* v. *The Stadium Co. supra.*

Nor is a literary society: *Re Bristol Athenaeum* (1890), 43 Ch. D. 236.

A company dissolved after a winding-up cannot again be ordered to be wound up: *Coxon* v. *Gorst* (1891), 2 Ch. 73; unless the winding up can be impeached for fraud: *Re London & Caledonia Co.* (1879), 11 Ch. D. 140; *Re Pinto Silver Mining Co.* (1878), 8 Ch. D. 273. But see *Re Crookhaven Mining Co.* (1886), L. R. 3 Eq. 73.

A company irregularly incorporated is non-existent and cannot be wound up: *Re National Debenture Corporation* (1891), W. N. 83; *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 354.

The same applies to an illegal company: *Re Padstow Total Loss* (1882), 20 Ch. D. 143; *In re Ilfracombe, &c., Building Society* (1901), 1 Ch. 102.

It is immaterial whether the company was carrying on business at the date of the winding-up: *Scott* v. *Hyde* (1909), Q. R. 18 K. B. 138. An incorporated bank which has never become entitled to commence business as a bank may be wound up: *Re Monarch Bank* (unreported; May 29, 1908.) The Court has jurisdiction to wind up a Manitoba Company having its head office in the province if it has assets in Canada,

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although it never carried on any business in Manitoba: *Re Stewart & Matthews Ltd.* (1916), 26 Man. L. R. 277.

Application of Act.

Sub-section (*b*) of s. 6 is not limited in its application to companies being wound up at the date of 45 Vict., c. 23. It applies also to companies insolvent though not technically being wound up and against which proceedings are being taken to realize their assets and pay their debts: *Re Union Fire Ins. Co.* (1886), 13 A. R. 268.

There is no clashing between s. 6 of R. S. C. c. 129 and s. 3 of 52 Vict., c. 32, as the latter Act provides for the voluntary winding up of the companies falling within its provisions and the former for a compulsory winding up: *Re Ontario Forge & Bolt Co.* (1894), 25 O. R. 407.

A provincially incorporated company must be brought within subsections (*a*) or (*b*) if an order is to be made: *In re Outlook Hotel Co.* (1909), 2 Sask. L. R. 435, 439.

Certain corporations excepted.

7. This Act does not apply to building societies which have not a capital stock or to railway or telegraph companies. R. S., c. 129, s. 3; 52 V., c. 32, s. 3.

See *Re Union Fire* (1890), 17 S. C. R. at p. 274.

PART I.

GENERAL.

Limitation of Part.

Subject to Part II.

8. In the case of a bank other than a savings bank the provisions of this Part are subject to the provisions of Part II. of this Act. R. S., c. 129, ss. 4 and 97.

The provisions in ss. 149 ff. must be complied with before the winding up can proceed. See *Mott* v. *Bank of Nova Scotia* (1887), 14 S. C. R. 650; *Re Central Bank* (1888), 15 O. R. at p. 310.

Subject to Part III.

9. In the case of life insurance companies, and of insurance companies doing life insurance and other insurance, in so far as relates to the life insurance business of such companies, the provisions of this Part are subject to the provisions of Part III. of this Act. R. S., c. 129, ss. 4 and 105.

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Subject to Part IV.

10. In the case of insurance companies other than life insurance companies, and of insurance companies doing life insurance and other insurance, in so far as relates to such other insurance, the provisions of this Part are subject to the provisions of Part IV. of this Act. R. S., c. 129, ss. 4 and 115..

Winding-up Order.

In what cases winding-up order may be made.

11. The court may make a winding-up order,—

(*a*) where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation has expired; or where the event, if any, has occurred, upon the occurrence of which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved;

(*b*) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up;

(*c*) when the company is insolvent;

(*d*) when the capital stock of the company is impaired to the extent of twenty-five per centum thereof, and when it is shown to the satisfaction of the court that the lost capital will not likely be restored within one year; or,

(*e*) when the court is of opinion that for any other reason it is just and equitable that the company should be wound up. 52 V., c. 32, s. 4.

Resolution of shareholders to wind-up (b).

Resolution of shareholders to wind up (b).

It has been held in Ontario that sub-sections (*b*) and (*d*) do not apply to a provincially incorporated company; insolvency must be shown: *Re Cramp Steel Co., Ltd.* (1908), 16 O. L. R. 230. But in *Re The Colonial Investment Co. of Winnipeg* (No. 2), (1914), 15 D. L. R. 634, a Manitoba company being voluntarily wound up pursuant to a shareholders' resolution was ordered to be wound up under this sub-section; and Kelly, J., made an order under sub-sections (*d*) and (*e*) in the case of an Ontario company: *Re Hamilton Ideal Manufacturing Co.* (1915), 34 O. L. R. 66. See also *Re Union Fire Insurance Co.* (1886-7), 13 A. R. 268 at p. 289.

As to what notice of the shareholders' meeting is sufficient, see *In re North-west Cattle Co.* (1907), Que. 5 P. R. 30.

Sect. 11.

Insolvency (*c*).

Insolvency (c).

As to what constitutes insolvency see s. 3 and notes, also the notes to s. 6.

Capital impaired (*d*).

Capital impaired (d).

In *Hamilton Ideal Manufacturing Co., Ltd.* (1915), 34 O. L. R. 66, the company had sold most of its assets to another company which had since gone into liquidation and was indebted to the vendor company. The company's assets outside of the money due to it were of small value and its business was not being actively carried on and there was no apparent prospect of a resuscitation of its business. It was held that an order might go under sub-section (*d*) and sub-section (*e*). As this was a provincially incorporated company the case appears to be in conflict with *Re Cramp Steel Co., Ltd.* (1908), 16 O. L. R. 230.

Just and equitable (*e*).

Just and equitable (e).

Where the subject matter of the business for which the company was incorporated has disappeared the Court may order a winding-up: *In re Haven Gold Mining Co.* (1882), 20 Ch. D. 151; *Hamilton Ideal Manufacturing Co., Ltd.* (1915), 34 O. L. R. 66; *Re Dominion Trust Co. & Boyce & McPherson* (1918), 43 D. L. R. 538. In such cases it is said that the sub-stratum of the company is gone, *e.g.*, where a company is formed to work a particular patent which is not granted: *In re German Date Coffee Co.* (1881-2), 20 Ch. D. 169. In the last mentioned case the general objects clauses were read as ancillary to the main object clause. As to the effect of a declaration inserted in the memorandum of association that none of the sub-clauses or objects therein specified shall be deemed subsidiary or auxiliary to the objects mentioned in the first sub-clause, see *Cotman* v. *Brougham* (1918), 87 L. J. Ch. 379 (H.L.). In *In re Coolgardie Consolidated Gold Mines, Ltd.* (1911),

Sub-stratum gone.

13 T. L. R. 301, Lindley, L. J., said that the Court ought to look at the question whether the primary object had failed so that the sub-stratum was gone, not merely as lawyers, but as business men, and in so doing came to the conclusion that the framers of the memorandum of association had the working of a particular property in view. Sect. 11.

If a material part of the sub-stratum is gone then the Court will look at all the other circumstances in order to see whether it is just and equitable to wind the company up. That the company was fraudulent from its inception and that a winding-up order was the best means of enabling defrauded shareholders to recover their money was held material: *In re Thomas Edward Brinsmead & Sons* (1897), 1 Ch. 45; but an order has been refused where a mining company still retained its property and there was still a means of working it under the charter: *Harris-Maxwell Larder Lake &c., Co.* (1909-10), 1 O. W. N. 984. See also *In re Suburban Hotel Co.* (1867), L. R. 2 Ch. App. 737; *Re Red Rock Mining Co.* (1889-90), 61 L. T. 785; *Anglo-Mexican Land* (1875), W. N. 168; *In re Crown Bank* (1890), 44 Ch. D. 634; *In re Florida* (1901-3), 9 B. C. R. 108.

Where the affairs of a company are brought to a deadlock it may be wound up on this ground: *In re Sailing Ship 'Kentmere'* (1897), W. N. 58; *In re American Pioneer Leather Co.* (1918), 87 L. J. Ch. 493; *Re Town Topics Co.* (1911), 20 Man. R. 574, 578; and even something short of a complete deadlock may suffice. See *Yenidje Tobacco Co.* (1917), 86 L. J. Ch. 1; (1916) 2 Ch. 426; see also *Re Winding-up Ordinance and Timbers, Ltd.* (1917), 35 D. L. R. 431. Mere dissension within the company is not sufficient; in such cases the remedy of the shareholders is by action: *Harris-Maxwell Larder Lake &c., Co.* (1909-10), 1 O. W. N. 984. In *Re Dewey & O'Heir Co.* (1909), 13 O. W. R. 32, 38, the Court refused to make an order though apparently there was a deadlock. Deadlock.

Sect. 11.

Ejusdem generis rule.

The rule that the words 'just and equitable' are to be construed *ejusdem generis* with other sub-sections of the corresponding section of the Imperial Companies Act has been considerably relaxed in the later English decisions: *In re Amalgamated Syndicate* (1897), 2 Ch. 600; *Yenidje Tobacco Co.* (1917), 86 L. J. Ch. 1 at p. 7. Moreover sub-section (*c*) of the Dominion Act contains the words 'for any other reason' which do not appear in the corresponding Imperial section.

Application for Order.

By whom made.

12. The application for such winding-up order may, in the cases mentioned in paragraphs (*a*) and (*b*) of the last preceding section be made by the company or by a shareholder; and in the case mentioned in paragraph (*c*) of the last preceding section by the company or by a creditor for the sum of at least two hundred dollars, or except in the case of banks and insurance corporations, by a shareholder holding shares in the capital stock of the company to the amount of at least five hundred dollars, and, in the other cases mentioned in the said section, by a shareholder holding shares in the capital stock of the company to the amount of at least five hundred dollars. R. S., c. 129, s. 8; 52 V., c. 32, s. 5; 62-63 V., c. 43, s. 4.

How and where made.

13. Such application may be made by petition to the court in the province where the head office of the company is situated, or, if there is no head office in Canada, then in the province where its chief place, or one of its chief places of business is situated.

Notice of application.

2. Except in cases where such application is made by the company, four days' notice of the application shall be given to the company before the making of the same. R. S., c. 129, s. 8; 52 V., c. 32, s. 6.

Compare Imperial Companies Act, 1862, s. 82.

The words 'capital stock' mean capital stock *de jure* or *de facto*, s. 2 (j).

In the case of banks it is necessary to take the preliminary proceedings provided by ss. 149 ff.

Practice.

Practice.

When a creditor has decided to apply for an order that a company be wound up, he gives four days'

notice to the company of his application and at the expiration of that time presents his petition verified by affidavit for such order to the Court. Notice of the time and place of the presentation of the petition should be served on the company along with the petition and affidavits. If an order winding up the company is made the order appoints an interim liquidator, and after notice to creditors, a permanent liquidator is appointed to wind up the company: *In re Steel Company of Canada* (1884), 17 N. S. R. 49. Secs. 12-13.

A petitioner may discontinue proceedings before the winding-up order is made, but other creditors who are not themselves petitioners are not entitled to be substituted: *Doyle* v. *Atlas Canning Co.* (1895-7), 5 B. C. R. 279.

Where an order had been obtained in Chambers by one creditor, the conduct of proceedings was under the special circumstances given to other creditors who had also applied for such order: *Re Joseph Hall Mfg. Co.* (1884), 10 P. R. 485.

Creditors may shew cause against or may appear and assist the petitioning creditor: *Re Lake Winnipeg, &c., Co.* (1891), 7 M. R. 255.

In Ontario a petition may be presented to a Judge in Chambers: *Re Toronto Brass Co.* (1898), 18 P. R. 248. See s. 109.

The Petition.

The petition itself must allege facts sufficient to justify a winding-up order. It is not enough that a proper case can be shown on the evidence: *In re Wear Engine Works Co.* (1875), L. R. 10 Ch. App. 188, 191; *Re Kootenay Brewing Co.* (1896-99), 6 B. C. R. 112; *In re Outlook Hotel Co.* (1909), 2 Sask. L. R. 435, 439. Petition.

It is prudent to draw the petition so as to bring the company within as many of the sub-sections of s. 3 as possible.

The petition should state the circumstances with sufficient detail to enable the Court to see from the

Secs. 12-13.

The petition.

petition itself that a winding-up order ought to be made: *Re Eldorado Union Stove Co.* (1886), 18 N. S. 514; *Wear Engine Works Co.* (1875), L. R. 10 Ch. App. 188 at p. 191; *Langham Skating Rink Co.* (1877), 5 Ch. D. 669; *White Star Consolidated Gold Mining Co.* (1883), 48 L. T. 815; *Patent Cocoa Fibre Co.* (1876), 1 Ch. D. 617; *Rica Gold Co.* (1879), 11 Ch. D. 36; *In re Atlas Canning Co.* (1895-97), 5 B. C. R. 661, 667.

If a creditor petitions for a compulsory order after the commencement of voluntary winding-up proceedings, he should allege the voluntary winding-up, and that he will be prejudiced thereby: *Re Electrical Engineering Co.* (1891), 64 L. T. 658; *Re Russell Cordner & Co.* (1891), 3 Ch. 175; *Re Medical Battery Co.* (1894), 1 Ch. 444.

One petition to wind up two companies is wrong: *Shields Marine Insurance Co.* (1867), W. N. 265 and 296.

Amendment.

A petition may be amended by leave of the Court: *Re Queen's Benefit Building Society* (1871), L. R. 6 Ch. 815.

Amendment.

The Court has power to permit amendments under ss. 128 and 129 of the Act: *Re Canadian General Service Corporation* (No. 2), (1914), 16 D. L. R. 17; 24 Man. L. R. 143. So where enough was shown to make it appear advisable that the company should be wound up, in *Re Redpath Motor Vehicles Co.* (1904), 4 O. W. R. 515, the Court gave leave to amend, offer additional evidence and again present the petition; see also *Re Ewart Carriage Works, Ltd.* (1904), 8 O. L. R. 527; *Re Abbott Mitchell, &c., Co., Ltd.* (1901), 2 O. L. R. 143. Where the petition can only be amended by alleging facts of insolvency arising since the date of filing the petition leave to amend will be refused; for, by section 5, the winding-up commences from the service of notice of presentation of the petition and the rights of other persons may be affected by such amendment: *Re Kootenay Brewing Co.* (1896-99), 6 B. C. R. 112.

Notice of application. Secs. 12-13.

Notice of application.

The four days' notice need not be clear days: *Re Arnold Chemical Co.* (1901), 2 O. L. R. 671. Under the rules in force in Manitoba apparently four clear days' notice is necessary except in cases of special hardship; and a Sunday will not be included: *Ashdown Hardware Co.* v. *Residential Building Co.* (1914-5), 7 W. W. R. 690. Thus a notice given on the first day of the month for a hearing on the fifth is sufficient: *Re Maritime Wrapper Co.* (1899-02), 35 N. B. R. 682.

Waiver.

The provision for four days' notice of the application cannot be waived by the company, and in the absence of requisite notice the order cannot be made, and although there is power to grant an adjournment under s. 14 this will not be done if there are other applications pending: *Re Farmers' Bank* (1910), 22 O. L. R. 556. In *Great West* v. *Installations Ltd.* (1914), 15 D. L. R. 896 (Alta.) it was held that notice was waivable; followed in the same province in *Re The Winding-up Act; Re The Consumers' Coal Co., Ltd.* (1917), 2 W. W. R. 143, where it was held that service of notice could be dispensed with under proper circumstances, e.g., where instructions to counsel to appear had been authorized at a meeting of the board and counsel had in fact appeared.

Apparently notice is dispensed with where the company is a party to the application: *Cie. Pontbriand* v. *Cosky* (1912-13), 14 Que. P. R. 19.

The notice referred to in the section has reference to the hearing and not to the filing, within the meaning of s. 5: *Re Halifax Power Co.* (1917), 36 D. L. R. 393.

The notice must be served on the company. Service on an assignee for creditors is not a compliance with s. 13 (2): *In re Rodney Casket Co.* (1906), 12 O. L. R. 409. Service on the creditors, contributories or shareholders is not required, but notice of application to appoint a liquidator should be: *Re Qu'Appelle Valley Farming Co.* (1888), 5 Man. R. 160.

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Application for order.

These may, however, appear *ex gratia*: *Re McLean, Stinson & Brodie, Ltd.* (1910), 2 O. W. N. 294. The curator of an insolvent bank is entitled to notice of the presentation of the petition: *Re Farmers' Bank* (1910), 22 O. L. R. 556. The requirements as to service are governed by the general rules of practice in force in the relative province, unless special rules have been made under s. 134, which will then apply. But the Consolidated Rules of Practice in Ontario are not made applicable by the Winding-up Act so as to enable the Court to shorten the period of notice of the application: *Re Farmers' Bank, supra.*

Evidence in support of petition.

Evidence in support of petition.

The petitioner must prove his case: *Re Grundy Stove Co.,* (1904) 7 O. L. R. 252; and the allegations in the petition should be verified by affidavit, for there must be evidence for the Court to act upon. While the Act does not require an affidavit the rules in force in the various provinces generally do, because a petition is not evidence: *In re Atlas Canning Co.* (1895-7), 5 B. C. R. 661. In *In re Maritime Wrapper Co.* (1899-02), 35 N. B. R. 682, it was held that the allegations in the petition could be proved at the hearing and need not be verified by affidavit.

A petitioner is not entitled to discovery: *Re West Devon Great Consols Mine* (1884), 27 Ch. D. 109, but under the practice in Ontario the evidence of any witness may be obtained for use in support of the petition: Con. Rule 228.

Unless or until rules of procedure are made under s. 134 of the Act the rules of practice in force in the relative province are made applicable by s. 135: *Re Belding Lumber Co., Ltd.* (1911), 23 O. L. R. 255. So where the practice of the Court is to support petitions by affidavits and *viva voce* evidence, shareholders petitioning for a winding-up were held entitled to examine the company's directors as witnesses in support of the petition: *Re Baynes Carriage Co.* (1913), 7 D. L. R. 257; 27 O. L. R. 144.

Where the rules require an affidavit to be filed before the presentation of the petition this requirement must be observed: *Re Kootenay Brewing Co.* (1896-99), 6 B. C. R. 112; leave to file a supplementary affidavit will generally be refused: *ibid.* Secs. 12-13.

When as between two competing petitions the order is made on the one later in point of time, owing to failure to file the affidavit in support of the earlier petition before service of the latter, as required by the rules, this is not a proper case for appellate interference: *Re Belding Lumber Co.* (1911), 23 O. L. R. 255.

The affidavit should be made by the petitioner, but an affidavit made by the petitioner's agent or solicitor may be sufficient: *Re Qu'Appelle Valley* (1888), 5 Man. R. 160, 166; and see *Re African Farms Ltd.* (1906), 1 Ch. 640. It has been held that in Manitoba a petition for a winding-up order can not be supported by statements verified by affidavit on information and belief: *Re Manitoba Commission Co.* (1912), 2 D. L. R. 1, though the English practice and that in Ontario and British Columbia is otherwise: *Re The Colonial Investment Co. of Winnipeg* (1914), 14 D. L. R. 563, 572. An affidavit of a person who deposes on information and belief, and who on cross-examination appears to have no knowledge of the facts, is a nullity: *In re Atlas Canning Co.* (1895-7), 5 B. C. R. 661; see also *Outlook Hotel* (1909), 2 Sask. L. R. 435. Where the rules, as in Manitoba, do not permit an affidavit on information and belief, a general verification by affidavit of various paragraphs of the petition is not to be encouraged, but constitutes evidence which may be given effect to in the absence of any conflicting material: *Re The Colonial Investment Co. of Winnipeg* (1914), 14 D. L. R. 563, 574.

It is the practice in Ontario to serve the affidavits with the petition, but *quaere* whether this is necessary unless the rules locally applicable specifically require it. For the practice in Saskatchewan see *Re Outlook Hotel Co.* (1909), 2 Sask. L. R. 435, 437.

Under the practice of the Courts in the Province of Ontario the officers of the company may be

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Evidence in support of petition.

examined and their depositions may be filed in support of the application for the winding up of the company. Sometimes the company itself or its officers admit the insolvency. In such case the preferable practice is for the company to appoint counsel to appear on their behalf on the hearing and admit the insolvency rather than to obtain an affidavit from one of the officers of the company whose statement having regard to the decisions below quoted may prove insufficient.

It will usually be desirable to supplement the affidavit by such additional evidence as is obtainable, and if any question is likely to arise regarding the existence or validity of the petitioner's claim, then to set forth fully the facts proving his claim.

Where the evidence depends upon statements which have been exhibited by the company, or admissions made by them, or written admissions or correspondence, these should be set forth as exhibits to the affidavit filed.

The deponent on an affidavit filed in support of the petition may be cross-examined thereon: *Re Manitoba Commission Co.,* (1912), 2 D. L. R. 1 at p.4; so also the affiant of an affidavit in opposition under the Manitoba Winding-up Act and rules: *Re Manitoba Commission Co.* (1911-2) 19 W. L. R. 893. But petitioners are not entitled to a preliminary order that certain of the company's officers should produce the books of the company and auditors' reports on their examination as compulsory witnesses in support of the petition: *Re Baynes Carriage Co.* (Decision No. 2), (1912), 8 D. L. R. 309.

The non-payment of a disputed debt is no proof of insolvency: *Re Wheal Lovell Mining Co.* (1849), 1 Mac. & G. 1, and *Gold Hill Mines* (1882), 23 Ch. D. 211; whether there is a debt must be settled by action before petition: *Re Great Britain Mutual Life Assurance Society* (1880), 16 Ch. D. 246; but the Court will determine existence of debt, if possible, on hearing petition: *Re Imperial Silver Quarries* (1868), 16 W. R. 1220; *Re Anglo-Bavarian Steel Ball Co.* (1899), W. N. 80.

If the dispute is *bona fide* the Court will restrain petition: *Cercle Restaurant Castiglione Co.* v. *Lavery* (1881), 18 Ch. D. 555; *Niger Merchants Co.* v. *Capper* (1877), 18 Ch. D. 557. Secs. 12-13.

Misconduct of directors is no ground for petition unless producing insolvency: *Re Anglo-Greek Steam Co.* (1866), L. R. 2 Eq. 11.

Non-payment of a judgment is no acknowledgment of insolvency: *Re Qu'Appelle Valley Farming Co.* (1888), 5 M. R. 160.

Non-appearance of a company to oppose a petition is no sufficient acknowledgment of insolvency within s-s. (*d*) of s. 3: *Re Lake Winnipeg T. L. & T. Co.* (1891), 7 M. R. 255.

The petitioner, who was president of the company, and also a large creditor, made affidavit that he knew the company to be unable to pay in full, but gave no comparative statement. Held, not sufficient evidence of insolvency: *Re Lake Winnipeg T. L. & T. Co., supra.*

The affidavits in support of the petition must bring it strictly within the words of the section. An affidavit of "insolvency within the meaning of the section" without stating facts is insufficient: *Re Rapid City Farmers Elevator Company* (1894), 9 Man. L. R. 574, following *Re Qu'Appelle Valley Farming Co.* (1888), 5 Man. L. R. 160. See *Re Lake Winnipeg Transportation Lumber & Trading Co.* (1890), L. J. 358; 7 Man. L. R. 255; *Chapel House Colliery Co.*, 24 Ch. D. 259, 270.

Where a petitioning creditor's debt is established and there is evidence that the company is unable to pay its debts within the meaning of the statute a winding-up order is, speaking generally, as against the company *ex debito justitiae*, and not a matter of discretion: *Bowes* v. *Hope M. Life Insurance Co.* (1865), 11 H. L. C. 402; *Re Western of Canada Oil Co.* (1873), L. R. 17 Eq. 1; *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259; *Re Uruguay Central Ry. Co. of Monte Video* (1879), 11 Ch. D. 372; *Re Great Western (Forest of Dean) Coal Consumers' Co.* (1882), 21 Practice.

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Ch. D. 773; *Re West Hartlepool Iron Works Co.* (1875), L. R. 10 Ch. 618; *Re Isle of Wight Ferry Co.* (1865), 2 H. & M. 597; but this rule does not apply as between the petitioning creditor and other creditors, and if the majority oppose the Court ought to regard their wishes: *Re West Hartlepool Iron Works Co.* (1875), L. R. 10 Ch. 618; *Western of Canada, etc., Co.* (1873), 17 Eq, 1; *Chapel House Colliery Co.* (1883), 24 Ch. D. 259; *Re E. Bishop & Sons, Limited* [1900] 2 Ch. 254; but the opposing creditors must prove their case: *Re Krasnapolsky Co.* [1892] 3 Ch. 174.

Where the Court was satisfied on the evidence that the company was unable to pay its debts, a winding-up order was made, though a call had been made, which the company alleged would meet its embarrassments: *Ex parte Spartali & Tabor; Re International Contract Co.* (1866), 14 L. T. 726.

Where a Banking Company had stopped payment, and the petitioning creditor proved his debt and refusal to pay, the Court refused to assent to a suggestion that the company would resume business in a few days, and made the order as *ex debito justitiae*: *Re Consolidated Bank* (1886), 14 L. T. 656.

A shareholder's petition on the ground of impairment of capital must be accompanied by evidence therefor apart from his affidavit: *Re A Company* (1917), 34 D. L. R. 396, 27 Man. L. R. 540.

Petition Granted.

Petition granted.

In the following cases the order was made on the petition of a creditor, though opposed by the company: *Re Commercial Bank of South Australia* (1886), 33 Ch. D. 174; *General Rolling Stock Co.* (1865), 34 Beav. 314; *Isle of Wight Ferry Co.* (1865) 2 H. & M. 597; *Family Endowment Society* (1870), L. R. 5 Ch. 118; *National Provincial Life Ass. Co.* (1870), L. R. 9 Eq. 306; *General Co. for Promotion of Land Credit* (1870), L. R. 5 Ch. 363; *Princess of Reuss* v. *Bos* (1871), L. R. 5 H. L. 176; *King's Cross Indus-*

trial Dwellings Co. (1870), L. R. 11 Eq. 149; *Re Home Assurance Association* (1871), L. R. 12 Eq. 112; *Flagstaff Silver Mining Co.* (1875), L. R. 20 Eq. 268; *Globe New Patent Iron Co.* (1875, L. R. 20 Eq. 337. Secs. 12-13.

A company's sphere of action being out of Canada is no bar to its being wound up provided it is incorporated there and is insolvent: *Re Madrid & Valencia Ry. Co.* (1849), 3 Dom. & Sm. 127; *Re Factage Parisien* (1865), 34 L. J. Ch. 140. Nor the fact that all its members are foreigners: *Re General Company for Promotion of Land Credit* (1870), 5 Ch. 363.

Petition Dismissed.

In the following cases a petition by a creditor was dismissed. Association illegal: *Padstow Total Loss Assn.* (1882), 20 Ch. D. 137; Petitioner a debenture holder: *Herne Bay Waterworks Co.* (1878), 10 Ch. D. 42; *Re Uruguay Central Ry. Co.* (1879), 11 Ch. D. 372. Petition dismissed.

Petition opposed by the majority of creditors and it did not appear that the petitioner would gain anything by an order: *Re Free Fishermen of Faversham* (1887), 36 Ch. D. 329; *Re Chapel House Colliery Co.* (1883), 24 Ch. D. 259; *Re Uruguay Central Ry. Co.* (1879), 11 Ch. D. 372.

Petitioners' claim for unliquidated damages and disputed: *Pen-y-Van Colliery Co.* (1877), 6 Ch. D. 477.

Petitioners' debt assigned since petition was presented: *Re Paris Skating Rink Co.* (1877), 5 Ch. D. 959.

Where twenty-one days after demand had not expired when petition presented: *Re Catholic Publishing Co.* (1864), 2 D. J. & S. 116.

Petitioners' debt disputed twenty-one days after demand had elapsed before petition was presented: *London & Paris Banking Corporation* (1874), 19 Eq. 444; *London Wharfing & Warehousing Co.* (1865), 35 Beav. 37; *Re Imperial Hydropathic Hotel Co.* (1883), 49 L. T. 147.

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Petition dismissed.

Petitioners' debt small and disputed and no evidence of the company's insolvency was adduced: Re *Gold Hill Mines* (1882), 23 Ch. D. 210; *Niger Merchants Co.* v. *Capper* (1877), 18 Ch. D. 557; *Re Positive Government Ins. Co.*, (1877), W. N. 23; *Re British Alliance Assurance Corporation* (1877), W. N. 261; *Ex p. Neuchatel Asphalt Co.* (1883), W. N. 17.

Petitioner's debt small and attached by judgment creditor of his own: *Re European Banking Co.* (1866), L. R. 2 Eq. 521.

Petitioners' debt not disputed but majority of creditors preferring a voluntary winding-up: *Langley Mill Steel, etc., Co.* (1871) L. R. 12 Eq. 26; *Re The Oro Fino Mines* (1900), 7 B. C. R. 388.

Where the company had made a voluntary assignment for the benefit of creditors and it was the desire of the great majority in number and value of the creditors that liquidation should proceed under the assignment: *Wakefield Rattan Co.* v. *Hamilton Manufacturing Co.* (1893), 24 O. R. 107: See *Re E. Bishop & Sons, Limited* (1900), 2 Ch. 254. See further notes to s. 14.

PETITION ADJOURNED.

Petition adjourned.

In the following cases a petition by a creditor was ordered to stand over to see if means could be found for paying dissentient creditors: *Re Western of Canada Oil Co.* (1873), L. R. 17 Eq. 1; *Re St. Thomas' Dock Co.* (1876), 2 Ch. D. 116; *Re Exmouth Docks Co.* (1873), L. R. 17 Eq. 181; *Re Brighton Hotel Co.* (1868), L. R. 6 Eq. 339; *Re Herne Bay Waterworks Co.* (1878), 10 Ch. D. 42. But see *per* Stirling, J., *Re Borough of Portsmouth Tramways Co.* [1892], 2 Ch. 362.

In these cases the order as between the petitioning creditor and the company is *ex debito justitiae,* and the enlargement of the hearing is granted on the representations and wishes of *creditors* other than the petitioner, not on the application of the company or of contributories. Compare *Re International*

Contract Co. (1866), 14 L. T. 726; *Re Consolidated Bank* (1866), 14 L. T. 656.

Petitioner was a debenture holder, and the petition was ordered to stand over for inquiry whether the company had any assets other than those comprised in the debentures: *Re Olathe Silver Mining Co.* (1884), 27 Ch. D. 278.

Petition opposed by a majority of creditors, and it was ordered to stand over for six months on terms, this being considered more beneficial to the other creditors than dismissing it: *Re Great Western Coal Consumers Co.* (1882), 21 Ch. D. 769.

Petitioners' debt disputed: *Ex p. The Rhydydefed Colliery Co.* (1858), 3 De G. & J. 80; *Re Inventors Association* (1865), 2 Dr. & Sm. 553; *Re Imperial Guardian Life* (1870), L. R. 9 Eq. 447; *Bowes* v. *Hope Life Ins. Co.* (1865), 11 H. L. C. 389; *Re General Exchange Bank* (1866), 14 W. R. 827; *Re Universal Bank* (1866), 14 W. R. 906. And see *The Brighton Club* (1865), 35 Beav. 204; 11 Jur. N. S. 436. See also *Re Edmonton Brewing & Malting Co.* (*Alta.*) (1918), 2 W. W. R. 350.

Who May Petition.

Who may petition.

It is to be noted that a person may be a 'creditor' within the meaning of s. 12 and s. 2 (j), and therefore entitled to petition when a company has become insolvent, even though he is not a creditor to whom a debt is 'then due' so as to be entitled to proceed under s. 4. "A creditor, in its primary meaning, imports one to whom a debt is due, in a secondary meaning one to whom money is owing but the period of payment has not arrived, *debitum in praesenti solvendum in futuro*. Section 6 (now s. 4) of the Act refers to a creditor whose debt is 'then due'; in section 8 (now s. 12) the term is 'creditor' only. The distinction is not unmeaning. In the one case the debt must be due, in the other it need not be due. In the latter case when a company has become insolvent such a creditor can be a petitioner": *In re Atlas Canning Co.* (1895-7), 5 B. C. R. 661 at p. 668.

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Who may petition.

A secured creditor may petition even though he has a lien for the full amount of his claim: *Re Strathy Wire Fence Co.* (1904) 8 O. L. R. 186, 192; and cf. *In re Great Western Coal Consumers Co.* (1882), 21 Ch. D. 769; but he need not state the value of his security: *Moor* v. *Anglo-Italian Bank* (1878-9), 10 Ch. D. 681; *Re Cushing Sulphite Fibre Co.* (1904-06), 37 N. B. R. 254.

Whether a bondholder is entitled to petition depends on the terms of his security. If a direct debt from the company to the holder is created in the bonds and there is no covenant with the trustees of the covering trust deed the bondholder may petition: *In re Olathe Silver Mining Co.* (1884), 27 Ch. D. 278; but not if the covenant is with the trustees only; *In re Uruguay Central* (1879), 11 Ch. D. 372. In *Re Cushing Sulphite Fibre Co.* (1904-5), 37 N. B. R. 254, two judges thought that the bonds in question fell under the Uruguay Central case, but the majority of the Court held that the bondholder was entitled to petition.

Holders of debenture stock secured by trust deed in which the covenant to pay principal and interest is between the company and the trustee, although the covenant is to pay the debenture stockholders, are not creditors entitled to present a winding-up petition. They are *cestuis que trust* only: *Dunderland Iron Ore Co.* (1909), 1 Ch. 446.

The following have been held entitled to petition: An executor of a creditor: *Re Masonic and General Life Assurance Co.* (1885), 32 Ch. D. 373; an assignee legal or equitable or bona fide holder of a debt; *Re The Ooregum Mining Co.* (1885), 29 Sol. J. 204; *Montgomery Ship Collision Doors Syndicate* (1903), 72 L. J. Ch. 624 (but the real and beneficial owners of the debt should join in the petition and proof: *Re People's Loan* (1906), 7 O. W. R. 253); a company: *Ex p. Mexican Santa Barbara Mining Co.* (1890), 34 Sol. J. 269; an assignee to whom the company has made an assignment for the benefit of its creditors: *National Automobile* (1914), 7 O. W. N. 22, in which it was

directed that the order should go on the filing of a written consent by a creditor or shareholder to the amount required by s. 12. A shareholder may petition, even though there is a voluntary winding-up pending: *National, &c., Ltd.* (1902), 2 Ch. D. 34, and notwithstanding that his shares carry no voting rights: *Canada Provident and Investment Cor.* (1913), 14 D. L. R. 782; but if his shares are fully paid he has no *locus standi* to petition unless he alleges that there is a surplus and supports his allegation by evidence, for otherwise he has no interest in the winding-up: *In re Vron Colliery Co.* (1881-2), 20 Ch. D. 442, 447. Secs. 12-13.

That the petitioner is an execution creditor is no bar where there are several execution creditors: *Lake Winnipeg, &c., Co.* (1891), 7 Man. R. 255.

The debt must be unquestioned and liquidated: *Schneider* v. *Laurentide* (1914), 15 Que. P. R. 271.

An equitable debt will support a petition: *Re London and Birmingham Flint Glass Co.* (1859), 1 D. F. & J. 257.

A garnishee order against a company does not make the garnishor a creditor of the company: *Re Combined Weighing Machine Co.* (1889), 43 Ch. D. 99.

An hypothecary creditor, who is not personally a creditor of a company, but can only take hypothecary action against it by reason of being in possession of immovables, has no status to demand that it be put in liquidation: *Leduc* v. *Kensington Land Co.* (1900), 16 R. J. Q. 213 (S. C.).

Persons who are parties to a deed of assignment made by the company for the benefit of its creditors and whereby an extension of time for payment of the company's debts is agreed to, are estopped from presenting a winding-up petition until the period of extension has expired: *In re Atlas Canning Co.* (1895-97), 5 B. C. R. 661.

Petitioning without reasonable and probable cause is a ground for action by company: *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674; *Suppresio veri* will defeat petition; *Ex. p. Barnett; Re Ipswich Ry. Co.* (1849), 1 DeG. & Sm. 744.

Secs. 12-13.

Shareholder.

A shareholder may petition in the cases mentioned in paragraphs (a) and (b) of s. 11, but not on the ground of insolvency under paragraph (c): *Re A Company* (1917), 34 D. L. R. 396, 27 Man. R. 540. See also *Re Colonial Investment Co.* (No. 2) (1914), 15 D. L. R. 634. In the cases mentioned in paragraphs (d) and (e) the petitioning shareholder must hold shares to at least five hundred dollars.

Power of court on application.

14. The Court may, on application for a winding-up order, make the order applied for, dismiss the petition with or without costs, adjourn the hearing conditionally or unconditionally, or make any interim or other order that it deems just. R. S., c. 129, s. 9.

Compare Imperial Companies Act, 1862, s. 86.

It has been said that on insolvency being shown a creditor is entitled to an order *ex debito justitiae,* but the words of the section imply a discretion in the Court: *In re Strathy Wire Fence Co.* (1904), 8 O. L. R. 186, 192, where Garrow, J.A., said: 'Some discretion must, in my opinion, be exercised in every case. The Court must before granting the order, see that the petitioner has a lawful claim, that the company is insolvent, that there are assets to be administered and that the proceedings proposed are necessary.'

The most that can be said is that when a creditor has made out a case under the Act he is generally or *prima facie* entitled to an order: *In re Chapel House Colliery Co.* (1883), 24 Ch. D. 259 at p. 268.

No assets.

No assets.

An order will not be made where it is shown that there are no assets which the liquidator can receive: *In re Chapel House Colliery, supra; Okell* v. *Morris, &c., Co.* (1902), 9 B. C. R. 153; *In re Georgian Bay Ship Canal Co.* (1899), 29 O. R. 358; *Re Ocean Falls Co.* (1913), 13 D. L. R. 265. But see *contra, Re Alexander Dunbar Sons & Co.* (1910), 9 E. L. R. 217. It is different if there are some assets: *In re Manitoba Commission Co. Ltd.* (1913), 9 D. L. R. 436; *Re Lacey*

& Co. (1877), 46 L. J. Ch. 660; or if it is not clear that there will be none, e.g., where there are shares subscribed for but not fully paid up: *In re Georgian Bay Ship Canal Co.* (1899), 29 O. R. 358; or where there is a probability that the creditors will derive some benefit from the order: *Re South East Corporation* (1915), 23 D. L. R. 724. The onus is on those opposing the petition to show that the creditors will derive no benefit, *ibid.* Sect. 14.

Under special circumstances, e.g., where a receiver for debenture holders has carried on the business of the company and has incurred further liabilities, an order may be made, even though the assets are small and more than covered by the debentures and the petitioners can not show that there will be any surplus for them: *Re Chic* (1905), 2 Ch. 345.

Where debenture holders were carrying on the business of the company, although no receiver had been appointed, an order was made in favor of petitioning judgment creditors on the ground that it was just and equitable to wind up the company even assuming that the assets were insufficient for the debenture holders: *In re Alfred Melson Ltd.* (1906), 1 Ch. 841. Under the later English decisions the order will not be refused because the assets are insufficient or because there are no assets; and if the order will be useful, though not necessarily fruitful, there is jurisdiction to make it: *Re Crigglestone Coal Co.* (1906), 2 Ch. 327.

Proceedings unnecessary.

If it does not appear that the proceedings proposed are necessary an order will not be made: *Re Strathy Wire Fence Co.* (1904), 8 O. L. R. 186; nor if the petitioner would gain nothing by the order: *Re East Kent Colliery Co.* (1914), 30 T. L. R. 659, but see *In re The Cushing Sulphite Fibre Co.* (1905), 37 N. B. R. 254. Proceedings unnecessary.

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Res judicata.

Res judicata.

The objection that a second application for a winding-up order can not be made after the first application has failed, on the ground that the matter is *res adjudicata,* does not apply where on the second application it appears that the parties are not the same and that the material urged in favor of the second application is different, although the purpose of the application is similar to that of the former: *Re Manitoba Commission Co. Ltd.* (1913), 9 D. L. R. 436.

Contests between creditors.

Contests between creditors.

Frequently contests arise between different classes of creditors where one set of claimants desires the liquidation to proceed under a voluntary assignment or voluntary winding-up (in the case of a provincially incorporated company) and the other desires a winding-up under the Act.

A winding-up will only be ordered when it is in the best interests of all the creditors; in the case of a conflict between the creditors and shareholders the rights of the former are regarded: *Fortin* v. *Dorchester* (1915), Que. 48 S. C. 258.

Where an assignment for the benefit of creditors has been made the Court will exercise its discretion in granting or refusing a winding-up order: *In re Strathy Wire Fence* (1914), 8 O. L. R. 186, and *Re Olympia Co.* (1915), 25 D. L. R. 620, where the order was refused; so also *Re Maple Leaf Dairy Co.* (1901), 2 O. L. R. 590, where the applicant was a creditor for a small amount. Likewise where the company's affairs are being wound up by a trustee for creditors the order has been refused: *Re M. A. Holladay Co.* (1915), 7 O. W. N. 321; but see *Re Tudhope Motor Co.,* (1913-4), 5 O. W. N. 865.

In *Re International Trap Rock Co.* (1915), 8 O. W. N. 461, an order was made though there had been an assignment under which a sale had been directed. See also *Re Heyes Bros.* (1915), 8 O. W. N. 390; *Re Elmira, &c., Co.* (1916), 10 O. W. N. 6.

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Where the petitioner is the only creditor desiring the order and it is not shown that he has a substantial interest the order will not be made: *Mardsen* v. *Minnekahda Land Co.* (1918), 40 D. L. R. 76.

When the petition is opposed by the majority of the creditors whose prospects of being paid would be diminished by a winding-up under the Act the order will be refused: *Re Ocean Falls Co.* (1913), 13 D. L. R. 265; *Re Edmonton Brewing, &c., Co.* (1919), 43 D. L. R. 749. But in a proper case the rights of minority creditors will be regarded: *Re Chas. H. Davies & Co.* (1907) 9 O. W. R. 993.

A single creditor is not entitled to an order where his rights could be as effectively exercised by action and judgment: *Re International Electric Co.* (1914), 31 O. L. R. 348, 353.

The court will not interfere with a voluntary and order a compulsory winding-up unless it is shown that the rights of the petitioners will be prejudiced by the voluntary liquidation: *Re Oro Fino Mines* (1898-1907), 7 B. C. R. 388; and in *National, &c., Co., Ltd.* (1902), 2 Ch. 34, the Court refused to upset a voluntary liquidation and make a compulsory order at the instance of a shareholder, the evidence being insufficient that any benefit would thereby result to the shareholders.

In *Re Hough Lithographing Co.* (1915), 8 O. W. N. 377, Sutherland, J., following *In re Crigglestone Coal Co., Ltd.* (1906), 2 Ch. 327, granted a winding-up order at the instance of an unsecured creditor notwithstanding that a liquidator appointed under the provisions of the Ontario Companies Act had disposed of the company's assets and had proceeded generally with the liquidation under that Act.

Where a petition is not made for a bona fide purpose, but merely to serve some collateral object, *e.g.*, to put pressure on the company for repayment of money paid on account of a stock subscription, the petition will be dismissed: *Re A Company* (1917), 34 D. L. R. 396, 27 Man. L. R. 540.

Where a petitioner dies before the order is granted, an order of revivor will be granted to his executors:

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Re Dynevor Collieries Co. (1878), W. N. 199; *Re Commercial Bank of London* (1888), W. N. 214.

A petition may be amended at the hearing: *Queen's Benefit Building Society* (1871), L. R. 6 Ch. 815. And although petition was opened and evidence was gone into leave was given to amend: *White Star Consolidated Gold Mining Co.* (1883), 48 L. T. 815. See also notes to s. 12.

A petition is not allowed to stand over unless clearly necessary: *Metropolitan Railway Warehousing Co.* (1867), 15 W. R. 1121. Not even if all parties desire, unless evidence shows such course is desirable: *Federal Bank of Australia* (1893), 62 L. J. Ch. 564.

If an offer were made to pay petitioner's debt and costs, and he afterwards brought petition to a hearing, costs incurred after the offer would not be allowed: *In re Times Life Assurance and Guarantee Society* (1869), L. R. 9 Eq. 382.

In England the parties entitled to be heard on the petition are the company, its contributories and creditors, yet other people may be heard as *amici curiae,* but no appeal is allowed them: *In re Bradford Navigation Co.* (1870), 5 Ch. 600.

And a shareholder may appear to support or object: *Re British Nation Life Assurance Association* (1872), 14 Eq. 492, 501.

In Canada creditors may show cause against or may appear and assist the petitioning creditor, and are entitled to costs of so doing: *Re Lake Manufacturing, etc., Co.* (1893), 9 M. R. 342, 13 C. L. T. 81; *Re Alpha Oil Co.* (1887), 12 P. R. 298.

Where there are several competing petitions the first applicant whose material is wholly regular will in general have the carriage of the order: *Re Farmers Bank of Canada* (1910), 22 O. L. R. 556, 558; *Re Joseph Hall Mfg. Co.* (1884), 10 P. R. 485; *Re Simpson & Hunter* (1916), 34 W. L. R. 850. If, however, the procedure of the applicant first in point of time is irregular, *e.g.,* if he has failed to file the affidavit in support of his petition as required by the rules, the order will be made upon the second petition: *Re Belding Lumber*

Co. (1911), 23 O. L. R. 255. In *Re Estates, Limited* (1904), 8 O. L. R. 564, where there were two petitions, the order was, under the circumstances, made on both petitions, but the conduct of the proceedings was given to the later petitioner, a creditor for money paid to the company under a contract, in preference to a prior petitioner, who was an employee in close touch with the officers and management. See *In re The Constantinople and Alexandria Hotel Co.* (1865), 13 W. R. 851; *Re The Commercial Discount Co.* (1863), 32 Beav. 198; also *Re Joseph Hall Mfg. Co.* (1884), 10 P. R. 485. Sect. 14.

COSTS OF PETITIONER.

Until notice of a prior petition, the court will allow the costs of all steps taken with a view to presenting another petition: *Re Manitoba Milling Co.* (1891), 8 M. R. 426; *Re Building Societies' Trust* (1890), 44 Ch. D. 140; *Re General Financial Bank* (1882), 20 Ch. D. 276; *Scott and Jackson* (1893), W. N. 184. Petitioner's costs.

A creditor presenting a winding-up petition with notice of an earlier one does so at his own risk as to costs, and can recover costs subsequently incurred only if he can show that the first petition was presented *malâ fide* or collusively: *Re Manitoba Milling Co. Co.* (1891), 8 Man. L. R. 426. If, on the other hand, the second petition was made in good faith and without notice of the first, the second petitioner's costs should be allowed: *Re Algoma Commercial Co.* (1904), 3 O. W. R. 140. In *Re Manitoba Milling Co., supra,* the order made was that the second petitioner should have his share of the costs of creditors supporting a winding-up order and the costs of his own petition to and including presentation when he first had notice of the earlier application. See also *In re Building Societies Trust, Ltd.* (1890), 44 Ch. D. 140; *Re Enterprise Hosiery Co.* (1904), 4 O. W. R. 57. Any attempt to forestall a bona fide application by a friendly one will not be encouraged, *ibid.*

If any director is attacked in the petition he appears separately, and if the case against him fails he is

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Rules as to costs.

entitled to his costs: *In re Anglo-Greek Steam Co.* (1866), L. R. 2 Eq. 1.

With regard to costs of the petition a general rule was laid down by Romilly, M.R., in *Re Humber Iron Works Co.* (1866), L. R. 2 Eq. 15, as follows:

1. Where the Court refuses to make the order, shareholders or creditors supporting the petition will not have their costs; shareholders, directors or others opposing the petition will not have their costs unless personally assailed by a charge which is disproved; the company opposing the order will have their costs from the petitioner.

2. Where the Court makes the order, no costs will be given to persons who appear to oppose the petition; and shareholders or creditors who, together or separately, appear to support the petition will get one set of costs between them and only one; the costs of the petitioner and the company will be given out of the estate.

This rule was reviewed in various subsequent cases and the practice in England now is to give costs to the petitioner if the petition succeeds, and to the company if it fails; and further, to give one set of costs to the contributories and one to the creditors who support the winning side. If the petition succeeds these costs are given out of the company's estate, if it fails they are given against the petitioner: *Re European Banking Co.* (1866), L. R. 2 Eq. 521; *Re Peckham Tram Co.* (1888), 57 L. J. Ch. 462; *Re Wiarton, &c., Co.* (1904), 3 O. W. R. 393.

But some sufficient grounds for appearing must be shown: *Re Hull & County Bank* (1876), 10 Ch. D. 130; *Re Albion Iron Works* (1901-4), 10 B. C. R. 351.

If payable out of the estate the costs so awarded are a first charge on it: *Re Audley Hall Cotton Spinning Co.* (1868), L. R. 6 Eq. 245; *Baden Machinery Co.* (1906), 12 O. L. R. 634.

In no case will the Court award the costs of a contest respecting the appointment of liquidator: *Re Commercial Bank of Manitoba* (1893), 13 C. L. T. 381. See also on costs: *In re Investment Trust, Ltd.* (1904), 1 Ch. 26.

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Costs directed to be paid by a company in liquidation are to be paid in full and not proved for: *Re Home Investment Society* (1880), 14 Ch. D. 167; *Madrid Bank* v. *Kelly* (1869), L. R. 6 Eq. 442.

If assets are insufficient, costs incurred in winding up rank after petitioners' costs and before liquidator's remuneration. See *In re Massey* (1870), 9 Eq. 367. But they rank after costs ordered to be paid by the liquidator or out of the assets: *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33.

Under the old practice a creditor could withdraw a petition even though the other creditors appearing pressed for an order to wind up. If he did, the Court dismissed it with costs, including costs of supporting creditor: *Re Times Life Assurance Co.* (1869), L. R. 9 Eq. 382; *In re Home Assurance Association* (1871), L. R. 12 Eq. 59. Or of opposing creditors: *In re Patent Cocoa Fibre Co.* (1876), 1 Ch. D. 617. See also *In re British Electric Tramways Co.* (1903), 1 Ch. 725.

By consent a petition might have been withdrawn after the winding-up order had been pronounced but not entered: *In re Crown Bank* (1890), 44 Ch. D. 634. In arranging a withdrawal the petitioner's costs should be paid down, for if an order is simply made for them and the company is subsequently wound up, he only comes in as an ordinary unsecured creditor: *Re Adjustable Horse Shoe Company* (1890), W. N. 157.

Where creditors' petition was ordered to stand over to establish a debt and the debt was established: Held that the petitioner was entitled to costs of establishment of debt as well as of petition: *In re Railway Finance Co.* (1866), 14 W. R. 785.

The common order dismissing the petition does not include the usual charges consequent on taking copies of evidence. If such are to be included special grounds must be shown at the hearing and the order must contain a special direction covering the matter: *In re Ibo, &c., Co., Ltd.* (1904), 1 Ch. 26.

Where petitioners know that they will be opposed by a majority of the creditors and the company's affairs are already being wound up under the Assign-

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ments Act, on their failure to obtain a winding-up order they may be compelled to pay three sets of costs; one to the company or the assignee, one to the creditors, and one to the contributories, if any: *Re Olympia* (1915), 32 W. L. R. 539, 628 (affirmed (1915), 25 D. L. R. 620).

COSTS OF LIQUIDATOR.

Liquidator's costs.

The general rule is that the liquidator is entitled to all the costs of all proceedings properly taken: *Re Silver Valley Mines Co.* (1882), 21 Ch. D. 381, unless he has done something to make himself personally liable: *Salisbury, Jones' and Dale's Case,* [1895] 1 Ch. 333. See also *Re London Metallurgical Co.,* [1895] 1 Ch. 758, where the authorities on this point are fully discussed.

Where there are incumbrances and the mortgaged property is realized in the winding up, the liquidator's costs of realization are a first charge, the incumbrances next and the general costs of winding up out of the surplus: *Re Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Batten* v. *Wedgewood, etc., Co.* (1884), 28 Ch. D. 317.

The solicitor of the liquidator has no claim for costs against the liquidator personally: *Re Trueman's Estate* (1872), L. R. 14 Eq. 278; *Re Anglo-Moravian Co.* (1875), 1 Ch. D. 130. Nor has he any lien on the file of proceedings for his costs: *Ex parte Pulbrook* (1869), L. R. 4 Ch. 627.

The petitioners' costs are the first charge on the estate even if priority to those of official liquidator: *Re Baden Machinery Co.* (1906), 12 O. L. R. 634; *In re Audley Hall Cotton Spinning Co.* (1868), L. R. 6 Eq. 245, which include the costs of establishing his claim; *In re Universal Non-tariff Fire Insurance Co.* (1875), W. N. 54. And he has them free of set off: *In re General Exchange Bank* (1867), L. R. 4 Eq. 138.

But if a company is in voluntary liquidation the costs of voluntary liquidator are paid in priority to those of petitioner: *In re New York Exchange Co.,* [1893] 1 Ch. 371. As to costs of voluntary liquidator

at hearing see *Re A. W. Hall & Co.* (1885), W. N. 190, and *Mont de Piété of England* (1892), W. N. 166. Sect. 14.

This priority is only enjoyed by petitioners for the winding-up order, not for costs awarded on other proceedings in the winding-up: *In re Marlborough Club Co.; Ex parte Percival* (1868), L. R. 6 Eq. 519.

Security for Costs.

Security for costs may be required where petitioner lives out of the jurisdiction: *In re Home Assurance Association* (1871), L. R. 12 Eq. 112. And also where petitioner cannot be found at his business address and his solicitor does not know his private address: *In re Sturgis (British) Motor Power Syndicate* (1886), 53 L. T. 715. But if a petitioner out of the jurisdiction has an unsatisfied judgment no security need be given: *In re Contract & Agency Corporation* (1887), 57 L. J. Ch. 5. Security for costs.

15. If the company opposes the application on the ground that it has not become insolvent, or that its suspension or default was only temporary, and was not caused by any deficiency in its assets, or that the capital stock is not impaired to the extent aforesaid, or that such impairment does not endanger the capacity of the company to pay its debts in full, or that there is a probability that the lost capital will be restored within a year or within a reasonable time thereafter, and shows reasonable cause for believing that such opposition is well founded, the court, in its discretion, may, from time to time, adjourn proceedings upon such application, for a time not exceeding six months from the date of the application, and may order an accountant or other person to inquire into the affairs of the company, and to report thereon within a period not exceeding thirty days from the date of such order. R. S., c. 129, s. 10; 52 V., c. 32, s. 8. Proceedings may be adjourned.

Compare Imperial Companies Act, 1862, s. 56.

An accountant will only be appointed under the section where there has been a *prima facie* case of insolvency made out such as would justify a winding-up order: *Re Manitoba Commission Co.* (1912), 2 D. L. R. 1.

See also *Imperial Steel and Wire Co., Ltd.* (1919), 17 O. W. N. 11.

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Duty of company and its officers if inquiry is ordered.

16. Upon the service on the company of an order made under the last preceding section, for an inquiry into the affairs of the company, the president, directors, officers and employees of the company and every other person, shall respectively exhibit to the accountant or other person named for the purpose of making such inquiry, the books of account of the company, and all inventories, papers and vouchers referring to the business of the company or of any person therewith, which are in his or their possession, custody or control, respectively; and they shall also respectively give all such information as is required by such accountant or other person as aforesaid, in order to form a just estimate of the affairs of the company. R. S., c. 129, s. 11.

Compare Imperial Companies Act, 1862, s. 58.

Power of the Court upon report of inquiry.

17. Upon receiving the report of the accountant or person ordered to inquire into the affairs of the company, and after hearing such shareholders or creditors of the company as desire to be heard thereon, the court may either refuse the application or make the winding-up order. R. S., c. 129, s. 12.

Compare Imperial Companies Act, 1862, s. 59.

Staying Proceedings.

Actions against company may be stayed.

18. The court may, upon the application of the company, or of any creditor or contributory, at any time after the presentation of a petition for a winding-up order and before making the order, restrain further proceedings in any action, suit or proceeding against the company, upon such terms as the court thinks fit. R. S., c. 129, s. 13.

See ss. 85, 87 and 163 of Imperial Companies Act of 1862; see also s. 16 (f), Ontario Judicature Act, R. S. O. (1914), c. 56.

A restraining order to prevent the execution by judgment creditors of process against the company can only be applied for after the presentation of the petition, and such petition can only be presented after four days' notice: *Re Eldorado Union Store Co.* (1886), 18 N. S. R. 6 R. & G. 514.

The enforcing of an execution is a "proceeding" under the section: *In re Artistic Colour Printing Co.* (1880), 14 Ch. D. 502; *In re Tobique Gypsum Co.* (1903), 6 O. L. R. 515. See also the notes under s. 22.

A creditor within the jurisdiction will be restrained from proceeding with an action beyond the territorial

jurisdiction of the Court: *In re International Pulp and Paper Co.* (1876), 3 Ch. D. 594; *re Tobique Gypsum Co., supra.* Sect. 18.

In those provinces whose codes of procedure do not contain any provision for staying proceedings analogous to s. 16 (f) Ont. Jud. Act, *supra*, the application under this section will be made *ex parte* to the judge before whom the winding-up petition is pending for an injunction restraining any actions or proceedings against the company wheresoever pending: *Re London & Suburban Bank Co.* (1871), 19 W. R. 950.

Where a provision as to stay of proceedings analogous to that above quoted obtains, the proper course is to apply by motion *ex parte* to the Court in which the action to be stayed is pending and that Court will upon the usual undertaking as to damages being given, stay further proceedings till the hearing of the petition: *Re General Service Co.*, [1891] 1 Ch. 496; *Masbach* v. *Anderson* (1877), 26 W. R. 100; *Rose* v. *Gardden* (1877-8), 3 Q. B. D. 235.

Usually the application is made on notice to the plaintiff in the action or suit, but in a proper case the order may be made on an *ex parte* application: *In re Tobique Gypsum Co., supra.* The latter is the practice in England, *vide* the cases cited *supra.*

The application may be made in Chambers, but it is questionable whether the Master-in-Chambers would have jurisdiction.

In cases of actions in foreign Courts, or of distress or sale, application would be made to the Court or Judge before whom the winding-up petition is pending for an injunction to restrain the proceeding till the hearing of the petition. If the application to restrain is made in the name of the company some responsible person must give the usual undertaking as to damages: *Westminster Assn.* v. *Upward* (1880), 24 Sol. J. 690.

For forms of orders, see Palmer's Company Precedents, Part III, 11th ed., pp. 473 ff.

The better practice is for the order to specify each action or proceeding in which the proceedings are to

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be restrained, but an order in general terms will not be invalid: *In re Tobique Gypsum Co., supra.*

Where the sheriff had, notwithstanding an order staying proceedings, proceeded with a sale under an execution against the lands of the company in the Province of New Brunswick, and had executed a deed to the purchaser, it was held that there was no jurisdiction in the Court to make an order under the Act summarily declaring the sale void so far as the purchaser and a mortgagee of the purchaser were concerned. Moss, C.J.O., stated that it would be different as regards the execution creditor, and perhaps the sheriff, *ibid.*

Court may stay winding-up proceedings.

19. The court may, upon the application of any creditor or contributory, at any time after the winding-up order is made, and upon proof, to the satisfaction of the court, that all proceedings in relation to the winding-up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as the court thinks fit. R. S., c. 129, s. 18.

A winding-up order once pronounced can be got rid of in three ways:—

(*a*) Before the order is entered the petition may be withdrawn and the order rescinded, assuming that there is only one petitioner: *In re Crown Bank* (1890), 44 Ch. D. 634. Once entered the Court has no jurisdiction to cancel it, except under special circumstances, *e.g.,* where it was obtained by fraud or concealment of material facts: *In re Equitable Loan Co.* (1903), 6 O. L. R. 26, 31, and cf. *McNabb* v. *Oppenheimer* (1885), 11 P. R. 214.

(*b*) The order may be appealed against; see the notes to ss. 101 and 104.

(*c*) An application may be made under s. 19 by any *creditor* or *contributory* (but not by the company: *Re Baxters, Ltd.* (1898), W. N. 60) that all proceedings under the winding-up order may be stayed. The Court has a discretion as to whether the stay should be granted, whether it should be absolute or limited and as to the terms and conditions thereof.

The principles on which the Court will act in the exercise of its jurisdiction with reference to staying

proceedings under a winding-up order are stated by Buckley, J., in *Re Telescriptor Syndicate* (1903), 2 Ch. 174, at p. 180, to be the same as where an application is made in bankruptcy to rescind a receiving order or annul an adjudication in bankruptcy where "The Court refuses to act on the mere assent of the creditors in the matter, and considers not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large. The mere consent of the creditors is but an element in the case." In exercising its discretion the Court will have regard to such facts as:—that there has been an undisclosed agreement between promoter and vendor providing for participation by the former in the share consideration payable on the sale; that there has been a gift of paid-up shares to the directors; that there are other matters connected with the promotion, formation or failure of the company, or the conduct of its business, which appear to call for investigation.

A stay may properly be asked for where some scheme of re-organization is contemplated: *Marine Investment Co.* (1873), 8 Ch. 702.

So also where a large number of the creditors desired that the liquidation should proceed under some form of voluntary liquidation already entered upon (*e.g.*, in Ontario under the Assignments and Preferences Act) as being more expeditious and inexpensive a stay was granted under the section: *Re Belding Lumber Co., Ltd.* (1911), 23 O. L. R. 255. In this case the stay was until the Court should further order an application of any creditor upon notice.

Where a shareholder obtained in Manitoba a winding-up order against a company incorporated in that province, but having the major part of its assets in Saskatchewan, and carrying on business in the United States, where on order of adjudication in bankruptcy had been made against it, the majority of the creditors and shareholders applied for a stay. All the unsecured creditors had proved their claims in the bankruptcy court. It was held that once everything necessary was

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Court may stay winding-up proceedings.

accomplished to make the assets of the company not vested in the trustee in bankruptcy available for the Canadian creditors *pari passu* with the creditors in the United States nothing further should be done under the order until it became necessary to take some action in aid of the bankruptcy proceedings: *Re Stewart & Matthews* (1916), 34 W. L. R. 47, (1916) 26 Man. L. R. 277.

A stay may be granted pending the preparation of a complete list of contributories: *Re Banque St. Jean* (1908), 10 Que. P. R. 223.

In *Re Installations, Ltd.* (1913), 14 D. L. R. 679, a stay was granted until the trial of an interpleader issue which had been pending.

Compare the Imperial Companies Act, 1862, s. 89, and see the following cases illustrating the conditions under which such stay will be granted: *Ex p. Barber* (1849), 1 Mac. & G. 176; *Re Worcester, etc., Ry. Co.* (1850), 3 De G. & Sm. 189; *Re South Barrule Co.* (1869), L. R. 8 Eq. 688; *Carew's Case* (1854), 5 D. M. & G. 94; *Underwood's Case* (1854), 5 D. M. & G. 677; *Clifton's Case* (1854), 5 DeG. M. & G. 743; *Re Continental Bank* (1867), 15 W. R. 548; *Re European Ass. Co.* (1872), W. N. 85. And as to costs see *Clark's Case* (1854), 1 K. & J. 22; *Ex p. Woolmer* (1851), 5 DeG. & Sm. 117.

Effect of Winding-up Order.

Company to cease business.

20. The company, from the time of the making of the winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof; but the corporate state and all the corporate powers of the company, notwithstanding it is otherwise provided by the Act, charter or instrument of incorporation, shall continue until the affairs of the company are wound up. R. S., c. 129, s. 15.

Compare Imperial Companies Act, 1862, s. 131.

On the making of a winding-up order the liquidator appointed by the Court takes over all the assets which are in the possession of the company, and the company's business ceases to be carried on except for the purposes of the liquidation. The corporate character, however, of the company continues: *L. Soucy* v. *Com-*

pagnie d'Imprimerie Industrielle (1902), Que. 5 P. R. 195; as do also its corporate powers, *e.g.*, the power to sue; though such powers must be exercised by the liquidator under the authority of the Court: *Kent* v. *Communauté des Soeurs de la Providence* (1903), A. C. 220. The liquidator must sue in his own name when he acts as the representative of creditors and contributories, in that of the company when he is recovering its debts or its property, *ibid.*: *Wm. Hamilton Mfg. Co.* v. *Hamilton Steel, &c., Co.* (1911), 23 O. L. R. 270, 282. See also *International Mining Syndicate* v. *Stewart* (1914), 48 N. S. R. 172.

If there is any doubt it is prudent to join both the company and the liquidator as co-plaintiffs.

On the appointment of the liquidator the powers of the directors cease, s. 31; except as continued under that section.

The winding-up relates back to the date of service of the petition, s. 5: *Bank of Hamilton* v. *Kramer Irwin* (1912), 1 D. L. R. 476.

After a winding-up order the power of collecting the assets of the company is vested solely in the liquidator: *Shaver* v. *Cotton* (1896), 23 A. R. 426 at 429 and 434; *Bank of Hochelaga* v. *Garth* (1886), 2 M. L. R. (S.C.) 201; *Richards* v. *Producers Rock & Gravel Co.* (1914), 17 D. L. R. 588; *Victoria-Montreal Fire, &c., Co.* v. *Derome* (1902), Que. 21 S. C. 319.

After the winding-up order has been made new rights are given by the Act of Parliament—rights which did not exist before the winding-up, and rights which can be enforced only under the winding-up: *In re National Funds Assurance Company* (1878), 10 Ch. D. 118, 125. The Statute of Limitations does not run against a creditor after the order has been made: *In re General Rolling Stock Company, Joint Stock Discount Co.'s Claim* (1872), L. R. 7 Ch. 646. The order nullifies as between the company and its creditors all contracts for interest: *In re International Contract Company, Hughes' Claim* (1872), L. R. 13 Eq. 623, unless there should turn out to be a surplus of assets.

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Effect of winding-up order.

After a winding-up order has been made a judgment creditor of the company cannot bring an action under R. S. O. 1886, c. 157, s. 61, against a contributory for payment of the amount unpaid on his shares: *Shaver* v. *Cotton* (1896), 23 A. R. 426.

As the section operates only from the time of the making of the order, *quære* whether a payment made by the company on the day of the service of the winding-up petition, the order being made five days later, is made after the commencement of the winding-up; and if so, whether by reason of that, though not objectionable under other sections of the Act, it ought to be set aside: *Trusts & Guarantee* v. *Munro* (1909), 19 O. L. R. 480, 487 and 488.

Contracts are not necessarily terminated by the mere fact of liquidation: *Hamilton Mfg. Co.* v. *Hamilton Steel, &c., Co.* (1911), 23 O. L. R. 270.

Effect on existing contracts.

Where a trust company under arrangement with a client is entitled to retain as its remuneration a percentage of the return on an investment made by it for the client, on the insolvency of the trust company the benefit of the arrangement passes to the liquidator who will not be compelled to surrender the security to the *cestui que trust;* nor will the Court appoint a special trustee for carrying the arrangement into effect: *Re Dominion Trust Co. and Harper* (1915), 24 D. L. R. 670.

If a liquidator sells goods previously purchased by the company under a conditional sale agreement the unpaid vendor is entitled to recover out of the estate the full amount due under the agreement: *In re Canadian Camera & Optical Co., A. R. Williams' Co. Claim* (1901), 2 O. L. R. 677.

Where a lessee from the company had an option to purchase the property, the winding-up did not cut down his rights. The company was held liable in damages to the lessee by reason of the sale of the property by the liquidator without giving the lessee an opportunity of exercising his option: *McCarter* v. *York County Loan* (1907), 14 O. L. R. 420.

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If the liquidator elects to perform a contract previously entered into by the company he can compel the other party likewise to carry it out: *Mersey Steel & Iron Co.* v. *Naylor* (1884), 9 App. Cas. 434.

Effect on voluntary winding-up.

While a winding-up order under the Act will supersede a voluntary winding-up, it does not render a voluntary winding-up void *ab initio;* and a subsequent proceeding under the Dominion Act will not vitiate the proceedings under the statute governing the voluntary liquidation: *Re City Transfer Co., Ex p. Potter* (1917), 34 D. L. R. 457.

Discharge of servants of company.

An order for the winding-up of the company is a notice of discharge to the servants of the company: *In re General Rolling Stock Co., Chapman's Case* (1886), L. R. 1 Eq. 346; *In re Imperial Wine Co., Shereff's Case* (1872), L. R. 14 Eq. 417; *In re Oriental Bank Corporation, MacDowall's Case* (1886), 32 Ch. D. 366. And see *Rolfe* v. *Canadian Timber and Saw Mills, Ltd.* (1904-7), 12 B. C. R. 363; *Re The City Cold Storage Co., Ltd.* (1916), 30 D. L. R. 574.

But where the business is continued after the winding-up and the former servants are actually employed, the old contract between the company and its servants continues in force. The notice of discharge must be given pursuant thereto: *In re English Joint Stock Bank, Ex p. Harding* (1867), L. R. 3 Eq. 341.

Effect on liens.

A winding-up order does not defeat a valid lien claimed by the solicitor on the documents of the company in his hands at the presentation of the petition: *In re Capital Fire Ins. Association* (1883), 24 Ch. D. 408.

The order does not interfere with the right of a mortgagee to appoint a receiver under a power in the mortgage deed: *In re Henry Pound, Son & Hutchins* (1889), 42 Ch. D. 402; but the receiver cannot take possession without the leave of the Court.

Shareholders.

For the effect of a winding-up order in preventing a shareholder from rescinding his contract to take shares. See *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 325; *Tennent* v. *Glasgow Bank* (1879), 4 App. Cas. 615.

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After the order he can no longer sue the company for a misrepresentation by which he was induced to take the shares: *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317. Nor for breach of contract in issuing shares at a discount in pursuance of an agreement to issue fully paid up shares: *In re Addlestone Linoleum Co.* (1887), 37 Ch. D. 191.

But any person who has entered into an agreement with the company, other than agreement to take shares, may if an action be brought against him for a breach of an agreement, even after the winding-up, plead by way of defence that he was induced to enter into the contract by the fraud of the directors: *In re Monarch Ins. Co., Gorrissen's Case* (1873), L. R. 8 Ch. 507, 516.

Contingent liabilities.

The winding-up order will not prevent a contingent liability on the part of the company from ripening into a debt; therefore the holder of a fire policy issued by a company may prove in the winding-up for the full amount of loss covered by the policy, though the fire occurred after the date of the winding-up order: *In re Northern Counties of England Fire Ins. Co., Macfarlane's Claim* (1880), 17 Ch. D. 337.

Date of discharge of liabilities.

Where the liquidators have not obtained leave to carry on the business of the company, their only duty is to wind it up, and they are bound to distribute the assets according to the liabilities as they exist at the date of the stoppage; they cannot alter those liabilities by making a fresh contract: *In re East of England Banking Co.* (1868), L. R. 4 Ch. 14.

Effect on articles.

It has been held in England that a provision in the articles that a call should not be made without the consent of three-fourths of the shareholders, does not apply to a call made in the winding-up: *In re Coed Madog Slate Co.* (1877), W. N. 190. Nor does a provision as to the instalments by which calls are to be payable: *In re Cordova Union Gold Co.*, [1891] 2 Ch. 580. But see s. 59 and notes of this Act.

Provisions in the articles as to interest upon calls do not apply to calls made in the winding-up: *In re Welsh Flannel and Tweed Co.* (1875), L. R. 20 Eq. 360.

21. All transfers of shares, except transfers made to or with the sanction of the liquidator, under the authority of the court, and every alteration in the status of the members of the company, after the commencement of such winding-up, shall be void. R. S., c. 129, s. 15. Sect. 21. Transfer of shares void.

Compare s. 131 Imperial Act, 1862.

Transfers of shares are forbidden after the commencement of the winding-up, *i.e.*, the date of service of the notice of presentation of the petition, s. 5. The Act contains no provision as to when the winding-up commences where the application for winding-up is by the company, for in that case no notice is required, s. 13 (2).

As to "alteration in the status of the members" see Palmer Precedents (1912), 11th ed., Part II, p. 448.

After a winding-up a transfer of shares may be made with the sanction of the liquidator acting under the authority of the Court: *Redfern* v. *Polson* (1894), 25 O. R. 321. Compare s. 34. See *Ex p. Taylor* (1877), W. N. p. 136; *Pacaud* v. *Fournier* (1883), 10 Q. L. R. 54.

The leave of the Court will only be granted upon special grounds: *In re Onward Building Society* (1891), 2 Q. B. D. 463. The general scheme of the Act is that "'as the tree falls so it must lie,' unless the Court chooses to alter the existing state of things," per Bowen, L.J., *ib.*, at p. 482.

The liquidator alone is powerless to accept transfers void under s. 21; nor will the fact that he has inadvertently placed the names of the transferees on the list of contributories and obtained a judgment against the transferees release the transferors: *Re Ontario Bank, Massey & Lee's Case* (1912), 8 D. L. R. 243.

The application of the section is limited to transfers of shares and alteration of the status of members: *Trusts & Guarantee Co.* v. *Munro* (1909), 19 O. L. R. 480, 487 and 488.

22. After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes. R. S., c. 129, s. 16. After winding-up order, actions against company stayed

Compare Imperial Companies Act, 1862, s. 87.

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Actions against company stayed.

The Court will not allow its administration of assets to be interfered with by other proceedings affecting the estate; and creditors of such estate must bring their rights into the Master's office, which the Act substitutes for proceedings at law: *Clarke* v. *Union Fire Insurance Co., Caston's Case* (1884), 10 P. R. 339. See also *Graham* v. *Casselman* (1893), Q. R. 4 S. C. 91.

The section must be read with section 133 of the Act which lays down the general rule that all remedies to enforce claims against the estate are obtainable by summary petition and not by action. The leave to proceed with or commence an action provided for in s. 22 is obtainable only where there are such exceptional circumstances present as justify its being granted: *Re Raven Lake Portland Cement Co., National Trust* v. *Trusts & Guarantee* (1911) 24 O. L. R. 286, and where nothing more than the amount and ordinary questions of fact and law are involved that is not enough: *Re J. McCarthy & Sons* (1916-7) 38 O. L. R. 3; 32 D. L. R. 441 (App. Div.). The section should further be compared with s. 84, which, as regards the proceedings to which it applies, viz., those of a judicial nature, has a retroactive effect. Section 22, on the other hand, while general in its application, only affects proceedings taken *after* the winding-up order has been made. Those taken before will not be affected unless they are caught by s. 84: *E. C. Colwell Candy Co.* (1899-02) 35 N. B. R. 613. See further the notes to s. 84.

The Court having charge of the winding-up is a Dominion Court and the operation of s. 22 extends to any province in which proceedings are sought to be taken. Thus it will prevent an action being brought against the company or its liquidator in another province without leave from the Court which has charge and control of the winding-up proceedings, *i.e.*, the Court which made the winding-up order: *Stewart* v. *Lepage* (1916), 53 S. C. R. 337; *H. J. Carson & Co.* v. *Montreal Trust Company* (1915), 49 N. S. R. 50; *Blais* v. *Bankers' Trust Corporation* (1913), 14 D. L. R. 277; *Re Hobbs and Kennabeek, &c., Co.* (1918), 14 O. W. N.

358, and see *Plante* v. *Dalmas Pulp Co.* (1914), 20 D. L. R. 983.

Ignorance of the existence of the winding-up order made in another province will not help the plaintiff, except possibly as to costs: *Lavell* v. *Canadian Mineral Rubber Co.* (1914), 14 D. L. R. 521, 523.

There is jurisdiction under the section even with regard to actions outside the ordinary territorial jurisdiction of the Court having the conduct of the winding-up: *In re Tobique Gypsum Co.* (1903), 6 O. L. R. 515, 518; and the Court has restrained an action in the Courts of another province against the insolvent company and its liquidators: *Baxter* v. *Central Bank* (1891), 20 O. R. 214.

No suit, action or other proceeding.

A suit cannot be entered against the liquidator without leave: *Robillard* v. *Blanchet* (1901), Q. R. 19 S. C. 383, and see the cases cited *supra;* but the section does not prevent a defendant from taking without leave the necessary steps to defend himself in an action brought against him by the liquidator or the company in liquidation, *e.g.,* an application to set aside a concurrent writ of summons for service out of the jurisdiction and service thereof: *Frid Lewis Co.* v. *Homes et al.* (1914-5), 8 Sask. L. R. 185. Nor does the section prevent a sheriff from making a return of *nulla bona* to a writ of execution issued and received before the making of the winding-up order, for that is not a "proceeding" within the section: *Pukulski* v. *Jardine* (1912), 26 O. L. R. 323; (1912), 5 D. L. 242. The section does not cover obligations incurred by the liquidator in the course of the liquidation: *Re Scott* v. *Silver* (1915), 8 O. W. N. 552. In the last mentioned case Middleton, J., dismissed a motion for an order prohibiting the enforcement of a judgment against a liquidator garnishee where leave to sue the liquidator had not been obtained.

Where a judgment had been reserved in the case the *délibéré* was discharged upon a winding-up order being made: *Molluer* v. *La Cie de Pulpe* (1887), 3 M. L. R. (S. C.) 273.

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In order to distrain after a winding-up order has been granted leave is necessary, for a distress is a "proceeding" within the section: *In re Ottawa Porcelain & Carbon Co.* (1900), 31 O. R. 679, 689. See further the notes to ss. 23 and 84.

Secured creditors.

Mortgagees or bondholders can not proceed to enforce their remedies without leave: *Re Winnipeg & Western Development Co.* (1915-16), 33 W. L. R. 749, though in *British Columbia Tie & Timber Co.* (1907-9), 14 B.C.R. 81, Clement, J., refused to interfere with a mortgagee's sale proceedings on the ground that he was not proceeding in defiance of s. 22, but this case seems to be opposed not only to the authorities elsewhere but also to *In re The Lenora Mount Sicker Co.* (1900-3), 9 B. C. R. 471, decided in the same province. See also *Re Dominion Milling Co.* (1912), 3 D. L. R. 897; 3 O. W. N. 1618.

The matter is further considered *infra,* and under s. 133 and in the notes to s. 69 of the Companies Act under the heading 'Bonds.'

Effect of the section on unauthorized proceedings.

An action brought without leave will be dismissed in Quebec on exception to the form: *Marcotte* v. *Turcot* (1901-2), 4 Q. P. R. 342; *Soucy* v. *Electric* (1902), 5 Q. P. R. 105. In Ontario a motion to dismiss such an action for want of prosecution was refused on the ground that the section imposed an absolute stay: *Duke* v. *Ulrey* (1909), 14 O. W. R. 392. In *Blais* v. *Bankers' Trust Corporation* (1914), 14 D. L. R. 277, and *Lavell* v. *Canadian Mineral Rubber* (1914), 14 D. L. R. 521, it was held that an action commenced without leave being irregular only should be stayed until leave was granted; so also to the same effect: *Stewart* v. *Lepage* (1916), 53 S. C. R. 337, and *H. J. Carson & Co.* v. *Montreal Trust Company* (1915), 49 N. S. R. 50. Sale proceedings commenced without leave were permitted to be carried on on terms without being required to be commenced anew: *Re Winnipeg & Western Development Co.* (1915-6), 33 W. L. R. 749. A garnishee summons depending on an unauthorized action is ineffective and will be set aside: *Lavell* v. *Canadian Mineral Rubber, supra.*

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Leave to continue an action is a matter of discretion and leave has been granted to enable the plaintiff to enforce the statutory remedy against directors which involves the need of a judgment and execution against the company with a return of the sheriff: *Risler* v. *Alberta Newspapers, Ltd.* (1919), 46 D. L. R. 536.

A judgment entered against the company after a winding-up order has been made is wholly void and nugatory: *Keating* v. *Graham* (1894), 26 O. R. 361; *Graham* v. *Casselman* (1893), Q. R. 4 S. C. 91.

Distress, attachment, etc.

For distresses, attachments, etc., which are specially dealt with in s. 23, see the notes to that section. An undertaking by a provisional liquidator in possession to pay a landlord's claim for overdue rent in preference to the claims of other creditors, where the landlord has taken no steps to assert his claim until after the winding-up has begun is, owing to ss. 22 and 23, void, unless the permission of the Court is first obtained: *Fuches* v. *Hamilton Tribune* (1884), 10 P. R. 409. A different view seems to have been taken by Morrison, J., in *Plummer* v. *Sullivan Machinery* (1917), 2 W. W. R. 229; 24 B. C. R. 104. There vendors of machinery under contract of conditional sale whereby the property remained in them until payment, and who had complied with s. 76 (the liquidator not having complied with s. 77), seized and re-sold the machinery, and an action brought by the liquidator for wrongful seizure, was dismissed. Morrison, J., observed that the sections of the Act as to restraining actions and not allowing them to proceed are intended, not for the purpose of harassing or impeding or injuring third parties, but for the purpose of preserving the limited assets of the company in the best way for distribution among creditors who may be entitled thereto.

Application for leave.

Application for leave (after an order of delegation has been made under s. 110) should, save in exceptional cases, be made to the Master or Referee: *Re J. McCarthy & Sons* (1916-7), 38 O. L. R. 3; 32 D. L. R. 441, per Hodgins, J.A. Hitherto applications have frequently been made to a Judge in Chambers not only in

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Ontario, but in the other provinces. A County Court Judge has no jurisdiction under the section: *Goldrich* v. *Colonial Assurance Co.* (1916), 28 D. L. R. 542.

The application must be made to the Court in Canada which has the conduct of the winding-up, even though the application is for leave to continue an action begun before the winding-up in a province other than that in which the winding-up is proceeding: *Brewster* v. *Canada Iron* (1914), 7 O. W. N. 128. See also *Plante* v. *Dalmas Pulp Co.* (1914), 20 D. L. R. 983. Leave, however, is obtainable in Ontario to sign final judgment against a company incorporated in England, having its head office there and being in process of liquidation there, but doing business and having assets in Ontario: *Plummer* v. *Superior, &c., Co.* (1885), 10 P. R. 527. Leave having been granted, the Exchequer Court is competent to entertain an action in rem against a ship for collision, its jurisdiction not being taken away by ss. 22 & 23: *The R. & O. Nav. Co.* v. *SS. Imperial* (1908-9), 12 Ex. Ct. 243.

Discretion to grant leave.

The effect of s. 133, where it applies, as to which see the notes to that section, is to make special grounds necessary to be shown in order to justify the granting of leave under s. 22: *Re Raven Lake Cement Co., National Trust* v. *Trusts & Guarantee* (1911), 24 O. L. R. 286; *Re J. McCarthy & Sons* (1916-7) 38 O. L. R. 3; 32 D. L. R. 441 (App. Div.).

Thus where in addition to the claims of the applicant and of the liquidator an interest in the assets in question was alleged by a mortgagee, who would not be bound by the determination of the issue as between the liquidator and the claimant by summary proceedings under s. 133, Mulock, C.J.K.B., in *Kurtz* v. *McLean* (1908), 11 O. W. R. 437, made an order that if the mortgagee was unwilling to come in under the winding-up proceedings, leave should be granted to bring an action.

After an order for winding-up of a Manitoba company, P., a servant of the company, asked leave to bring an action against the company for arrears of wages so that after a return of *nulla bona* he might

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sue the directors under s. 276 of the Manitoba Companies Act. Leave was granted: *Re Lake Winnipeg Transportation Co.* (1891), 7 Man. R. 602.

Where previously to the winding-up a shareholder had been sued by the Company for unpaid calls and had delivered a defence and counterclaimed for the cancellation of his subscription on the ground of misrepresentations in the prospectus, the shareholder's application for leave to proceed in the action was refused on the ground that he could have in the winding-up all the relief claimed in the action: *Re Pakenham Pork Packing Co.* (1903), 6 O. L. R. 582. But where a shareholder had sued for cancellation of his subscription on the ground of fraud, and costs had been incurred and the action was on the list for trial, leave was granted in Quebec: *Johnson* v. *The Ewart Co.* (1907), Q. R. 31 S. C. 336. Where, although the amount to be claimed in the proposed action is considerable, but nothing more than the amount and ordinary questions of fact and law are involved, leave is not to be granted: *Re J. McCarthy & Sons* (1916-17), 38 O. L. R. 3; 32 D. L. R. 441 (App. Div.). So also an application was refused for leave to bring an action to set aside stock subscriptions on failure of the applicant to show such special and unusual circumstances as to make it reasonably clear that the Master could not satisfactorily deal with the question: *Titherington* v. *Distributors* (1906), 8 O. W. R. 329.

Where an action has already been dismissed and has become barred by lapse of time when the winding-up order is made a new action should not be authorized: *Goldrich* v. *Colonial Assurance Co.* (1916), 28 D. L. R. 542.

Appeal from order under s. 22.

An appeal lies from an order made under s. 22, giving leave to bring an action: *Re J. McCarthy & Sons* (1916-7), 38 O. L. R. 3; 32 D. L. R. 441. Where the Court cannot say that the discretion of the Judge or official to whom the application was made was exercised wrongly, his order granting or refusing leave will not be disturbed on appeal: *Re Raven Lake Portland Cement Co., National Trust* v. *Trusts & Guaran-*

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tee (1911), 24 O. L. R. 286; *Re Toronto Cream and Butter Co.* (1909), 14 O. W. R. 81. Where leave had been granted to the applicant to sue the company for specific performance of an agreement for exchange of lands, or in default for cancellation of the agreement and recovery of the applicant's lands, of which the company was in possession, the Master's discretion in granting leave was held on appeal to have been properly exercised: *Re Transcontinental Townsite Co.* (1915), 21 D. L. R. 291; 25 Man. L. R. 193. The discretion may be reviewed on appeal: *Re Cushing Sulphite Fibre Co.* (1906-8), 38 N. B. R. 581. Moreover, where the order appealed from was made on a wrong principle it was set aside by the Ontario Court of Appeal: *Re J. McCarthy & Sons* (1916-7), 38 O. L. R. 3; 32 D. L. R. 441. The rule, however, that an exercise of a discretion proceeding on proper principles is not generally to be interfered with, still stands, *ibid.*, per Meredith, C.J.C.P.

Application to stay proceedings.

When the Court is asked to stay an action, the only material question to be considered is, whether there are any circumstances which render it necessary that the action should be continued, or whether the claim of the plaintiff is not one which can be as easily dealt with in the winding-up as in any other way. If the claim sought to be enforced is capable of being satisfactorily dealt with in the winding-up other proceedings to enforce it will be stayed: *In re Hermann Loog, Limited* (1887), 36 Ch. D. 502; *In re International Pulp & Paper Co.* (1876), 3 Ch. D. 594; *In re Australian Direct Steam Navigation Co.* (1875), L. R. 20 Eq. 325; *Re Briton Medical Assurance Association* (1886), 32 Ch. D. 503.

See also the cases *supra* and the notes to s. 133 of the Act.

After a winding-up order had been made, P., a resident of Ontario, brought an action against the company in the State of Michigan, to attach certain property of the company there. The liquidator brought an action in Ontario for an injunction to restrain P. from proceeding with his action in Michigan. Held,

that this case could not be distinguished in principle from *Ex parte Railway Steel and Plant Co., In re Taylor* (1878), 8 Ch. D. 183, and upon the facts disclosed the injunction was refused and P. was allowed to continue his action in Michigan: *In re Lake Superior Native Copper Co., Ltd., Re Plummer* (1885), 9 O. R. 277.

If the Court is of the opinion that the action ought not to be stopped, *e.g.*, where an action is instituted against directors and other individuals as well as against the company, the Court will allow the proceedings to go on, but will require the plaintiff to undertake not to issue execution against the company without leave of the Court: *McEwan* v. *London and Bombay and Mediterranean Bank* (1866), W. N. 407; *Hagell* v. *Currie* (1867), W. N. 75.

Mortgagees and bondholders.

Secured creditors such as mortgagees and bondholders are in a different position. A mortgagee will not generally be restrained from enforcing his rights against the mortgaged property: *Lloyd* v. *David Lloyd & Co.* (1877), 6 Ch. D. 339; *Re Longendale Cotton Spinning Co.* (1878), 8 Ch. D. 150; *Re Cushing Sulphite Fibre Co.* (1906-8), 38 N. B. R. 581. It is otherwise where there is only an equitable charge and not a mortgage: *Andrews* v. *Swansea* (1880), 50 L. J. Q. B. 428. In general the secured creditor has a right to apply for and obtain leave to bring an action or take sale proceedings: *In re The Lenora Mount Sicker, &c., Co.* (1900-3), 9 B. C. R. 471; *Re Winnipeg & Western Development Co.* (1915-6), 33 W. L. R. 749. Terms may be imposed, *e.g.*, in the last mentioned case successive adjournments were ordered conditionally on the company's making certain payments of arrears of interest and taxes with a view to protecting the company and permitting the assets to be sold. The liquidator, however, is not entitled to the conduct of a sale under foreclosure proceedings, and an order made at his instance by the Judge directing the winding-up proceedings postponing the sale and directing the referee to advertise and fixing a subsequent date for sale, was held to be bad: *Re Cushing Sulphite Fibre Co.*

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(1906-8), 38 N. B. R. 581. The fact that prior to the winding-up order judgments against the company have been registered will not disentitle a mortgagee or bondholder from obtaining leave to proceed to enforce his security: *Re Giant Mining Co.* (1901-4), 10 B. C. R. 327.

While the bondholders will be permitted to proceed unless any special reasons are shown to the contrary, the Court has a discretion to grant or refuse leave, and in *Re Martin International Trap Rock Co.* (1915), 8 O. W. N. 599, a delay was ordered to enable the liquidator to sell the assets. Moreover, where a bondholder's application for leave to commence an action is opposed by the majority of the bondholders, the Court has refused leave: *Re Excelsior Brick Co., Ltd.* (1916), an unreported decision of Middleton, J.

See further s. 133 and the notes to s. 69 of the Companies Act, under "Bonds" and "Receivers."

Execution, etc., against company void.

23. Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void. R. S., c. 129, s. 17.

Compare s. 18 of this Act, and see notes to that section.

Compare ss. 163 and 198 of Imperial Companies Act, 1862, (the last named section is not in the Canadian Act), but the Act has been construed to have the same effect as though it contained such a section: *Shaver* v. *Cotton* (1896), 23 A. R. 426; *Re Exhall Mining Co.*, 4 DeG. J. & S. 377. Section 163 (now s. 211 of the Imperial Act of 1908) corresponds to our section 23, and section 87 (now s. 142 of the Imperial Act of 1908) corresponds to our section 22. The two sections must be read together. The result, accordingly, is that only every attachment, sequestration, distress or execution "put in force" after the winding-up order is void, and even the putting in force is void only if leave has not been obtained under section 22: *Risler* v. *Alberta Newspapers, Ltd.* (1919), 46 D. L. R. 536, 538.

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In the English Act, s. 163 is controlled by s. 87, and the Court has declared itself competent to allow attachments, distresses, etc.: *Ex parte Carnelly* (1887), 35 Ch. D. 656.

But this power is not exercisable by Canadian Courts owing to the provisions of s. 84. Per Osler, J.A., in *Shaver* v. *Cotton* (1896), 23 A. R. at p. 435.

Sed qu. at any rate as regards a distress: *In re Ottawa Porcelain & Carbon Co.* (1900), 31 O. R. 679, 689, where it is indicated that leave may be granted. If there is no right to prove, rights under a distress made before the order will be preserved, *ibid.* at p. 690, citing *Re Army & Navy Co.*, January 11, 1898, unreported. See also *E. C. Colwell Candy Co.* (1899-02), 35 N. B. R. 613.

The section will apply in all provinces where the company's assets may be situate: *Re Producers' Rock & Gravel Co., Ltd.* (1913), 14 D. L. R. 289. The operation of the section is limited to creditors of the company, and it does not apply to outsiders: *Good* v. *Nepisiguit Lumber Co.* (1911-13), 41 N. B. R. 57; *In re Regent United Service Stores* (1878), 8 Ch. D. 616.

Sequestration.

It appears that the term "sequestration" as used in s. 23 means sequestration to recover payment of a judgment already obtained: *Richelieu & Ontario Navigation Co.* v. *SS. "Imperial"* (1808-9), 12 Ex. Ct. R. 243; but see *Re Australian Direct Steam Navigation Co.* (1875), L. R. 20 Eq. 325.

Landlord's claim for rent.

An undertaking by a provisional liquidator in possession to pay a landlord's claim to be paid preferentially for overdue rent, after service of notice under s. 12 of 45 Viet. c. 25 (Dom.) is by ss. 20 and 21 of that Act (ss. 22 & 23 of this Act) void, unless the permission of the Court is first obtained: *Fuches* v. *Hamilton Tribune* (1884), 10 P. R. 409.

After a winding-up order the property of the company cannot be sold for taxes: *School Commissioners of Hochelaga* v. *Montreal Abattoir Co.* (1887), 3 M. L. R. (Q. B.) 116.

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The effect of this section with sections 20, 23 and 84 is to prevent a liquidator from allowing a preference or priority unless impressed upon assets before the same were taken possession of by him: *Faulkners, Ltd.* (1915), 34 O. L. R. 536, 538.

The preferential lien for rent conferred by s. 38 of the Ontario Landlord and Tenant Act, R. S. O. 1914, c. 155, in the case of an assignment for the benefit of the creditors is a statutory lien independent of actual distress or possession. So where a company makes an assignment and subsequently a winding-up order is granted, the goods of the company become subject to the winding-up order charged with the preferential lien: *Re Fashion Shop* (1915), 33 O. L. R. 253.

Executions levied before winding-up order.

Where a creditor has actually issued executions against a company before a petition to wind it up has been presented, and the sheriff is in possession when it is presented, the Court will not interfere and deprive the creditor of the fruits of his diligence: *Re Withernsea Brickworks* (1880), 16 Ch. D. 337; *Merchants' Bank* v. *Roche Coal Co.* (1892-3), 3 Terr. L. R. 463, unless under any special circumstance, *e.g.*, oppression or fraud. See *Perkins Beach Lead Mining Co.* (1877), 7 Ch. D. 371. But see now s. 84.

But it may be a question how far this principle would be applied in Ontario having regard to the policy of equal distribution among creditors established by the Creditors' Relief Act. See *Dawson* v. *Moffatt* (1886), 11 O. R. 484. But see *contra, McLean* v. *Allen* (1890), 14 P. R. 84.

But, as a rule, if the sheriff does not seize before the commencement of the winding-up the execution will be stayed. See *Ex p. Railway Steel and Plant Co., In re Williams* (1878), 8 Ch. D. 192. And receivers appointed in the same interval will be restrained from acting: *Campbell* v. *Compagnie Générale de Bellegarde* (1876), 2 Ch. D. 181; *Perry* v. *Oriental Hotels Co.* (1870), L. R. 5 Ch. 420.

Where the execution preceded the petition to wind up, the Court, whilst staying the execution, has directed the liquidator to sell for the benefit of the execution

creditor: *Ex p. Railway Steel & Plant Co., In re Taylor* (1878), 8 Ch. D. 183, thus substantially securing to him the fruits of his diligence. *A fortiori* the Court will not interfere with an execution creditor who actually got his money before the winding-up order is made: *Ex p. Hawkins* (1868) 3 Ch. 787. Sect. 23.

But having regard to the Creditors' Relief Act, it seems more than doubtful whether this rule would be applied in Ontario except perhaps in respect of the costs of the first execution creditor.

A payment after a winding-up order has been made in order to avoid an execution is illegal: *Richards* v. *Producers* (1914), 17 D. L. R. 588.

See further s. 84 of the Act, which provides in effect that an execution creates no lien if before payment over to the plaintiff of the moneys actually levied the winding up of the company's business has commenced, *i.e.*, the notice of presentation of the petition has been served (s. 5).

Executions issued after a petition for a winding-up order has been presented stand in a different position: *Ex p. Railway Steel and Plant Co., In re Williams* (1878), 8 Ch. D. 192. These are void and the sheriff is not entitled to his fees in respect of such an unauthorized execution notwithstanding that the same was levied in a province other than that in which the winding-up order was made and in ignorance of the existence of the order: *Re Producers, &c., Co.* (1913), 14 D. L. R. 289 (B.C.); *Pilote* v. *Leclerc* (1917), 52 Que. S. C. 127. Executions levied after a winding-up order.

A person who executes a judgment in contravention of the section may be obliged to pay the liquidator's costs of opposing the execution; *G. N. W. Telegraph Co.* v. *La Cie du Journal du Monde* (1902-3), 5 Que. P. R. 379. Under the English Act leave to issue execution has been granted after the winding-up on the ground that the creditor had been prevented from doing so before the winding-up by the trickery of the company: *Amarduct* v. *General Incandescent Co.* (1911), 2 K. B. 143.

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But a return by the sheriff after the winding-up that the writ is unsatisfied is not prohibited: *Pukulski* v. *Jardine* (1912), 5 D. L. R. 242; 26 O. L. R. 323.

Garnishee.

In the case of an execution by a writ of *fi. fa.*, the important date is that on which the sheriff seizes; in the case of an attachment of a debt by means of a garnishee order the date to be considered is the date on which the order *nisi* is served; in other respects the rule applicable to the stay of these two forms of proceeding is the same: *Re Stanhope Silkstone Collieries Co.* (1879), 11 Ch. D. 160.

But see s. 84, which negatives the lien unless the moneys have been paid over before the winding-up has commenced: *Lavell* v. *Canadian Mineral Rubber Co.* (1913), 14 D. L. R. 521.

A garnishee summons issued after a winding-up order is ineffective to attach moneys owing to the company and will be set aside: *Lavell* v. *Canadian Mineral Rubber Co.* (1913), 14 D. L. R. 521.

Rent.

As regards distresses, the sections under consideration only apply to a landlord who seeks to distrain upon goods of a company, which is his legal tenant. Therefore in *New City Constitutional Club Co.* (1887), 34 Ch. D. 646, the Court decided that it could not prevent a landlord from distraining upon goods which, although originally the property of the company, had ceased to be so by being charged for more than their full value in favor of debenture holders. Again when the landlord has no right of proof against the company, the Court will not restrain the landlord from levying a distress on the company's goods: *In re Lundy Granite Co., Ex p. Heaven* (1871), L. R. 6 Ch. 462; *Re Carriage Co-operative Supply Association* (1883), 23 Ch. D. 154; *In re Exhall Coal Mining Co.* (1864), 4 De G. J. & S. 377; *Re Regent United Service Stores* (1878), 8 Ch. D. 616.

Rent accruing before winding-up.

If the rent accrued due before the commencement of the winding-up, the landlord will not be allowed to distrain: *Re Traders North Staffordshire Carrying Co.* (1874), L. R. 19 Eq. 60; *Thomas* v. *Patent Lionite Co.* (1881), 17 Ch. D. 250. Even though the liquidator

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may have retained possession of and carried on the company's works upon the land: *In re North Yorkshire Iron Co.* (1878), 7 Ch. D. 661; *Re Brown, Bayley & Dixon* (1881), 18 Ch. D. 649. The landlord must prove for his debt like any other creditor: *In re South Kensington Co-operative Stores* (1881), 17 Ch. D. 161; *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322; *Fuches v Hamilton Tribune Co.* (1884), 10 P. R. 409.

A distress made before the making of a winding-up order is not avoided thereby: *Re E. C. Colwell Candy Co.* (1899-02), 35 N. B. R. 613; and see s. 84 and notes. There is nothing in ss. 22, 23 and 84 to prevent a landlord from realizing where the distress has been put into effect before the commencement of the winding-up: *Re Shirleys, Ltd.* (1916), 29 D. L. R. 273. If the company by its liquidator remains in possession for the purpose of the realization of its property to better advantage, it can only do so on the terms of the lease. The lessor is entitled to receive out of the assets got in by the liquidator the sum required to put the premises in the repair required by the covenants and not merely to prove for his claim: *In re Levi & Co., Ltd.* (1919), 88 L. J. Ch. 233.

Rent accruing after winding-up.

If the rent accrued since the commencement of the winding-up, the landlord will be allowed to distrain for it or receive payment in full, if the liquidator has retained possession of the property for the purposes of the winding-up, or for carrying on the company's business, or in order to sell it, or to do the best he can with it; for under these circumstances the rent is considered as one of the expenses of the winding-up and should be paid in full like any other debt properly incurred by the liquidator: *Re Lundy Granite Co.* (1871), L. R. 6 Ch. 462; *Re North Yorkshire Iron Co.* (1878), 7 Ch. D. 661; *Re Silkstone & Dodworth Iron Co.* (1881), 17 Ch. D. 158; *Re South Kensington Co-operative Stores* (1881), 17 Ch. D. 161; *Re Brown, Bayley & Dixon* (1881), 18 Ch. D. 649; *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322.

If the rent has accrued due partly before and partly after the commencement of the winding-up, if the landlord establishes his right to distrain, or be paid in full,

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for the latter portion of the rent, the rent will be apportioned, and the distress will be allowed for so much as accrued after the winding-up commenced: *Re South Kensington Co-operative Stores* (1881), 17 Ch. D. 161.

Appointment of Liquidators.

Liquidator to be appointed.

24. The court in making the winding-up order, may appoint a liquidator or more than one liquidator of the estate and effects of the company. R. S., c. 129, s. 20.

Acting liquidator

25. If more than one liquidator is appointed, the court may declare whether any act to be done by a liquidator is to be done by all or any one or more of the liquidators. R. S., c. 129, s. 23.

Additional liquidators.

26. The court may, if it thinks fit, after the appointment of one or more liquidators, appoint an additional liquidator or liquidators. R. S., c. 129, s. 22.

Notice previous to appointment.

27. No liquidator aforesaid shall be appointed unless a previous notice is given to the creditors, contributories and shareholders or members; and the court shall by order direct the manner and form in which such notice shall be given and the length of such notice. R. S., c. 129, s. 20.

Compare Imperial Companies Act, 1862, ss. 92 and 149.

Appointment of Liquidator.

Appointment of liquidator.

Under the former Act, 45 Vict., (Dom.) c. 23, the liquidator must be appointed by the winding-up order. In this present section the word used is "may." The practice now is on the first order to appoint a provisional liquidator as provided in s. 29, and then appoint the permanent liquidator after notice as prescribed by s. 27: *Shoolbred* v. *Union Fire* (1887), 14 S. C. R. 624; *Re Union Fire* (1886), 13 A. R. 268 and (1885), 10 O. R. 489; *Great West Supply Co.* v. *Installations, Ltd.* (1914), 15 D. L. R. 896.

The winding-up order in the usual form delegates to the Master-in-Ordinary or Official Referee the powers of the Court, as may be done under s. 110 of the Act, the practice in this respect differing from that in England where the Judge must exercise his own discretion in the appointment of the liquidator.

See *Re Guelph Linseed Oil Co.* (1903), 2 O. W. R. 1151; *Cie Villeneuve* v. *Price Bros., Ltd.* (1909), Q. R. 36 S. C. 396.

The Master-in-Ordinary or Official Referee then directs a notice to be sent out for the appointment of a permanent liquidator.

Notice.

Previous notice of the appointment of the permanent liquidator must be given to the creditors, contributories and shareholders or members in compliance with s. 27; otherwise the appointment will be set aside: *Shoolbred* v. *Union Fire* (1887), 14 S. C. R. 624; *Re Guelph Linseed Oil Co.* (1903), 2 O. W. R. 115, *Great West Supply Co.* v. *Installations, Ltd.* (1914), 15 D. L. R. 896; *Stimson* v. *Northwest Cattle Co.* (1902-3), 5 Que. P. R. 181.

As to the nature of the notice, see *Cie Villeneuve* v. *Price Bros., Ltd.* (1909), Q. R. 36 S. C. 396.

Who will be appointed.

Upon a contest for the appointment of liquidators in a winding-up proceeding it is desirable to follow the rules for guidance to be found in the English cases under the Companies Acts. The Court abstains from laying down any such rule as that the nominee of the petitioning creditors should have a preference. The Court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, and, other things being equal, will act upon their recommendation: *Re Alpha Oil Co.* (1887), 12 P. R. 298.

When the creditors were those whose interests were most to be regarded and the great bulk of them favoured the appointment of L. and opposed the nominee of the petitioning creditors, and L., who resided in the county where the company's operations were carried on, and where all its books and assets were, was already *de facto* liquidator under voluntary proceedings taken pursuant to the Ontario Act and was otherwise well qualified for the position, the Court appointed him liquidator. One set of costs allowed out of estate to successful creditors following *Re Northern Assam Tea Co.* (1870), L. R. 5 Ch. 644; *Re Alpha Oil Co.* (1887), 12 P. R. 298.

Secs. 24-27.

Appointment of liquidator.

Cæteris paribus, the petitioner's nominee is preferred: *Re General Provident Ins. Co.* (1868), 17 W. R. 42; *Re Albert Average Association* (1870), 5 L. R. Ch. 597.

No hard and fast rule to this effect exists—wishes of those most interested are regarded: *Re Northern Assam Tea Company* (1870), L. R. 5 Ch. 644; *Re Hoyland and Silkstone Colliery Co.* (1884), W. N. 13; *Re Association of Land Financiers* (1878), 10 Ch. D. 269.

The Court has a discretion and is not merely to register the result of the determination of the creditors and contributories and it may refuse to accept their nominee: *Re International Contract Co.* (1866), L. R. 1 Ch. 523; *Re London & Bombay & M. Bank,* L. R. 1 Ch. 525; *Re Northern Assam Tea Co.* (1870), L. R. 5 Ch. 644.

See also *In re Radford & Bright,* [1901] 1 Ch. 272.

Compare also: *Re Johannesburg Gold Trust Co.,* [1892] 1 Ch. 583; *Re Land Development Association* (1892), W. N. 23; *Re Commercial Bank of Manitoba* (1893), 9 Man. R. 342.

Appeal.

While an appeal may be taken against the appointment (*Markle* v. *Ross* (1889), 13 P. R. 135), the Court of Appeal will not interfere with the discretion of the Judge in the appointment of a liquidator: *Re International Contract Co.* (1866), L. R. 1 Ch. 523; *Re Railway Finance Co.* (1866), 14 W. R. 956; *Re Albert Average Assoc.* (1870), L. R. 5 Ch. 597, and see *Forsythe* v. *The Bank of Nova Scotia* (1890-1), 18 S. C. R. 707, affirming (1889-90) 22 N. S. R. 97.

Liquidators should be disinterested persons, and neither creditors nor shareholders should be appointed: *Re Central Bank of Canada* (1887), 15 O. R. 309; *Re Men's Wear, Ltd.* (1915), 22 D. L. R. 530.

The appointment of a shareholder is not favored: *Re Northumberland and Durham Banking Co.* (1858), 2 D. & J. 508.

If, however, all the creditors desire the appointment of an individual who happens to be a shareholder, he may be appointed: *Re New Westminster Gas Co.* (1895-7), 5 B. C. R. 618.

Where the creditors have the chief and immediate concern in realizing the assets, their nominees will be appointed as against the nominees of the shareholders: *Re Central Bank of Canada* (1887), 15 O. R. 309. It is not necessary for both creditors and shareholders to be represented, and a bank may be appointed liquidator: *Forsythe* v. *Bank of Nova Scotia* (1890-1), 18 S. C. R. 707. Secs. 24-27.

One of the proposed liquidators was formerly an official of the bank and was largely indebted to it, though it was claimed that his indebtedness was fully secured; his principal support also was from those connected with the former management of the bank. Held, that the objections to his appointment were most serious: *Re Commercial Bank of Manitoba* (1893), 9 Man. R. 342.

In appointing liquidators to a bank the Court is confined to those nominated at the meeting of creditors and shareholders, but is not bound by the result of the voting and ought to exercise its own discretion in the selection of liquidators: *Re Commercial Bank of Manitoba, supra.* Liquidators to a bank

It is not usual to appoint more than one liquidator: *Re Dignard* (1910), 11 Q. P. R. 389. Where a voluntary winding up is superseded by a compulsory order the voluntary liquidator is usually continued: *Re London & Mediterranean Banking Co.* (1866), 15 W. R. 33. A similar practice obtains in the case of a receivership: *Cf. Shoolbred* v. *Clark* (1890), 17 S. C. R. 265, or assignment.

28. The court shall also determine what security shall be given by a liquidator on his appointment. R. S., c. 129, s. 24. Security.

Compare Imperial Companies Act, 1862, s. 92; also Imperial Companies (Winding-up) Act, 1890, s. 4, s-s. 3, and English Rule 67.

No special rules, instructions or forms regarding security have been adopted in Ontario.

The security most usually given is the bond of a guarantee company, but other security has frequently been accepted.

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Security.

When the liquidation has been partially completed the security is sometimes reduced.

The security need not be fixed by the winding-up order; it may be left to the Master under s. 110: *Shoolbred* v. *Clark* (1890), 17 S. C. R. 265.

As to certificate of liquidator's liability on default, see *Re Birmingham Brewing Co.* (1883), 52 L. J. Ch. 358. The sureties have a right to appeal against the Master's certificate where the bond provides that the same shall be sufficient evidence of the amount of the liquidator's liability: *Re Army & Navy Clothing Co.* (1902), 3 O. L. R. 37.

Provisional liquidator.

29. The court may on the presentation of the petition for a winding-up order or at any time thereafter and before the first appointment of a liquidator appoint provisionally a liquidator of the estate and effects of the company and may limit and restrict his powers by the order appointing him. R. S., c. 129 s. 26; 52 V., 32, s. 12.

Compare Imperial Companies Act, 1862, s. 92.

See the notes under ss. 24 ff. at p. 750.

Incorporated company may be appointed.

30. An incorporated company may be appointed liquidator to the goods and effects of a company under this Act; and if an incorporated company is so appointed, it may act through one or more of its principal officers designated by the court. R. S., c. 129, s. 21.

2. Where under the laws of any province a trust company is accepted by the courts of such province, and is permitted to act, as administrator, assignee or curator without giving security, such trust company may be appointed liquidator of a company under this Act, without giving security. 6-7 Ed. VII. (1917), c. 51.

See *Forsythe* v. *Bank of Nova Scotia* (1890-1), 18 S. C. R. 707.

See *Clarke and Union Fire Ins. Co.* (1885), 10 O. R. 489; *Forsythe* v. *Bank of Nova Scotia* (1889-90), 18 S. C. R. 707.

Powers of directors to cease.

31. Upon the appointment of the liquidator all the powers of the directors shall cease, except in so far as the court or the liquidator sanctions the continuance of such powers. R. S., c. 129, s. 34.

Compare Imperial Companies Act, 1862, s. 133, s-s. 5.

Property of the Mabow Coal and Gypsum Company in liquidation was sold at public auction and knocked down to McK., who has been a director of the company and who was appointed and acted as secretary-treasurer until the winding-up was made. On motion of the liquidator to confirm the sale, Held, that when the company was put into liquidation the management and control of the property by the director ceased, and consequently that the sale was good: *Re Mabow Coal and Gypsum Co.* (1894), 27 N. S. 305; *Chatham National Bank* v. *McKeen* (1895), 24 S. C. R. 348. Sect. 31.

The company defendant, before the appointment of a liquidator, was summoned to answer interrogatories upon articulated facts, but a liquidator was appointed before the day fixed for answering. The rule was continued by consent to a subsequent day, and on that day no one appearing to answer, default was entered. Held, inasmuch as by s. 34 (now s. 31) of the Winding-up Act, upon the appointment of a liquidator all the powers of the directors cease, except in so far as the Court or the liquidator sanction their continuance, the directors after the appointment of a liquidator could not authorize any person to answer for them unless their powers had been specially continued to that effect. The company was, therefore, relieved from the default and the liquidator allowed to answer: *Graham* v. *Casselman Lumber Co. and Larmouth* (1893), 4 R. J. Q. (S. C.) 91.

See also notes under s. 20.

32. A liquidator may resign or may be removed by the court on due cause shown, and every vacancy in the office of liquidator shall be filled by the court. R. S., c. 129, s. 27. Resignation and removal.

Compare Imperial Companies Act, 1862, ss. 93, 141; Companies (Consolidation) Act, 1908, ss. 149 (6), 186 (viii).

Intention to leave the country is a due cause for resignation, see *Re Woodburn Sons Co., Ltd.* (1910), Que. 11 P. R. 393.

Where there is want of harmony between the liquidators the Court will remove one of them on the advice

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Resignation and removal of liquidator.

of the creditors: *Cloyes* v. *Darling* (1884), 16 R. L. 649; *Exchange Bank* v. *Campbell* (1885), 15 R. L. 373. See also *Re Banque d'Echange and Darling* (1884), 16 R. L. 649.

An application to remove a liquidator and appoint others was granted upon the grounds:—(1) That the majority of creditors requested the change. (2) That the proposed liquidators would act without remuneration. (3) That the business connection of one of the proposed liquidators would be of value to the company: *Re Assiniboine Valley Stock and Dairy Farming Co.* (1889), 6 M. R. 105.

See *Sir John Moore Gold Mining Co.* (1879), 12 Ch. D. 328-331; *Ex p. Newitt* (1884), 14 Q. B. D. 177; *Re Adam Eyton, Limited,* 36 Ch. D. 299; *Re City and County Investment Co.* (1877), 25 W. R. 342; *Re Marseilles Extension Co.* (1867), L. R. 4 Eq. 692; *Re British Nation Assurance Co.* (1872), L. R. 14 Eq. 492; *Re Hatzic Prairie Co., Ltd.* (1915), 15 D. L. R. 772 (where the liquidators wrongfully delegated their powers).

The interests of the liquidation are alone considered, no personal unfitness need be shewn: *Re Adam Eyton, Limited* (1887), 36 Ch. D. 299. The liquidator has a right of appeal against the removal, *ibid.*

Removal may be directed if the liquidator has conflicting interests: *Re City and County Investment Co.* (1877), 25 W. R. 342; or if he is guilty of misconduct: *Re London Flour Co.* (1868), 16 W. R. 553.

The Court has refused to remove a liquidator on the sole ground that he was an employee of one of the inspectors: *Rigaud Granite Co.* v. *Wylie* (1916-7), Que. 18 P. R. 266.

As to purchase by liquidator: see *Re Madras Irrigation Co.* (1883), 23 Ch. D. 252.

Refusal to employ as solicitor the nominee of creditors is not ground for removal: *Re Plymouth Patent Sugar Co.* (1870), W. N. 84.

Personal unfitness includes favoritism to persons whose interests are opposed to those of others: *Re Sir John Moore Gold Mining Co.* (1879), 12 Ch. D. 325.

If any vacancy occurs all the property of the company is deemed to be in the custody of the Court. *Section* 46. Sect. 32.

The application to remove should be made by motion to the officer of the Court to whom the reference to wind up has been directed, and supported by affidavits establishing the grounds relied on.

See also s. 140 (2) for removal by the Court for offence against that section.

Powers and Duties of Liquidators.

33. The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled, and he shall perform such duties in reference to winding-up the business of the company as are imposed by the court or by this Act. R. S., c. 129, s. 30. Duties after appointment.

The liquidator's first duty as regards the estate is to take charge of all the company's assets. He will then proceed to convert them into money, collect outstanding accounts and generally administer the affairs of the company with a view to realization and applying the proceeds in payment of the company's creditors.

A winding-up order supersedes an execution, and the liquidator will be entitled to possession of the goods pending enquiry as to validity of claims asserted in respect of them: *Re Ideal Foundry and Hardware Co.* (1918), 42 O. L. R. 411.

Where the liquidator has previously been in possession as assignee, on his appointment as liquidator the estate is in his hands as such: *Re Army and Navy Co.* (1902), 3 O. L. R. 37. While the title to the company's estate is not by the Act vested in the liquidator, it is his duty to protect any property in his custody for the benefit of the creditors. This duty extends to any property of which he takes over possession from an assignee for creditors of the company: *National Trust* v. *Trusts and Guarantee* (1912), 26 O. L. R. 279, 289. As to claim of liquidator on proceeds of book debts assigned by a company and collected by it where

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the company is subsequently wound up, see *Re Cope Fruit Co., Ltd., and Bank of Montreal* (1917), 32 D. L. R. 346; see also *Re Kootenay Valley Co., Ltd.* (1912), 3 D. L. R. 428. The Court will not divest the liquidator of an insolvent trust company of a trust coupled with an interest held by the company and which is an asset in the winding-up: *Re Dominion Trust Co. and Harper* (1915) 24 D. L. R. 670. In *Re Colonial Investment Co.* (1914), 15 D. L. R. 650, an application by the liquidator for delivery to him of the assets in the hands of the voluntary liquidator was ordered to stand over pending a reference to the Master to pass the accounts of the voluntary liquidator.

On the appointment of the liquidator the powers of the directors cease, except as their continuance is sanctioned by the Court or the liquidator, s. 31. If the powers of the directors are not continued as provided by s. 31 their fiduciary relation to the company or its shareholders is at an end, and a sale to them by the liquidator of the company is valid: *Chatham National Brick* v. *McKeen* (1895), 24 S. C. R. 348. See the notes to s. 31.

On the occurrence of a winding-up the business of the company ceases except so far as the liquidator deems necessary for the beneficial winding up of its affairs, s. 20; but as regards the carrying on of the company's business by the liquidator he can only do so subject to the provisions of s. 34, *infra.*

As stated by Lord Davy in *Kent* v. *Communaute* (1903), A. C. 220, at p. 226, "The office of the liquidator has in fact a double aspect, on the one hand he wields the powers of the company, and on the other hand he is the representative for some purposes of the creditors and contributories." He is an officer of the Court and like other officers may be ordered to refund money paid to him under mistake of law: *In re Opera, Limited* (1891), 2 Ch. 154. He is expressly made subject to the jurisdiction which the Court may exercise under s. 123 in respect of misfeasance in office; the Court can compel performance of the liquidator's duties by s. 132.

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The High Court of Justice in Ontario in which proceedings were pending under the Dominion Act for the winding up of the Central Bank granted an injunction to restrain one Baxter from proceeding in the Courts of Quebec against the liquidators for things done in their official capacity: *Re Central Bank, Baxter* v. *Central Bank* (1890), 20 O. R. 214.

To a limited extent the liquidator seems to be in the position of a trustee. But his true position is that of agent for the company; he is not, strictly speaking, a trustee for either the creditors or contributories; therefore, in the absence of fraud, *mala fides* or personal misconduct, an action for damages will not lie against him at the suit either of a creditor or contributory for delay in paying the creditor's debts or in handing over to the contributory his proportion of the surplus assets: *Knowles* v. *Scott*, [1891] 1 Ch. 717.

Where the liquidators of a colliery company sold the colliery to a new company, in which they took shares, it was held that they must be removed from their office: *In re Devonshire Silkstone Coal Co.* (1878), W. N. 71; see Healey's Joint Stock Companies (3rd ed.), p. 654.

Where the sale of an undertaking of a company by its liquidator to himself had been set aside on the ground of fraud the liquidator was ordered to repay the rents and profits which had accrued, but not the interest on the same: *Silkstone, etc., Coal Co.* v. *Edey*, [1900] 1 Ch. 167.

The following are some of the judicial expressions of opinion in the English Courts and in our own Courts on the position of the liquidator as regards the extent to which he represents creditors as well as the company:

"In a winding-up the liquidator acts not only for creditors but for contributories and for the company also. The liquidator does not act more for the creditors than he does for the company. . . . I think a liquidator is much more in the position of an ordinary receiver or even of a mortgagor who has executed a bill of sale than of an execution creditor." Per Page-Wood, V.-C. in *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601 and 610.

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" Generally speaking, he is said to represent the company, the creditors and the general body of contributories." Per Cairns, L.J. in *Re Joint Stock Discount Co., Sichell's Case* (1867), L. R. 3 Ch. 119, 122.

Powers and duties of liquidator.

" The liquidator represents the creditors . . . but only because he represents the company and through the company the rights of the creditors are to be enforced," per Cairns, L.J., in *In re Duckworth* (1867), L. R. 2 Ch. App. 578, at p. 580, and adopted by Lord Westbury in *Waterhouse* v. *Jamieson* (1870), L. R. 2 H. L. Sc. 29, 38.

" The liquidator seems to be somewhat in the position of a receiver or agent appointed by the Court to represent the company for the purposes of the Act; not as an assignee, but as the statutory representative of the company for the purposes of winding up," per Mabee, J., in *McCarter* v. *York County Loan* (1907), 14 O. L. R. 420, at p. 422.

Lessee.

It is clear that against a lessee from the company the liquidator stands in no higher position than the company itself: *McCarter* v. *York County Loan* (1907), 14 O. L. R. 420; and as against a person who has duly registered a mechanics' lien for material supplied and work performed before the commencement of the winding-up the liquidator represents no higher claim than the company, so that the lienholder will be entitled to his statutory priority: *Re Clinton Thresher Co.* (1910), 15 O. W. R. 318.

Lienholder.

Taking advantage of defects in securities.

Whether the liquidator has on behalf of creditors the right to object to formal defects or want of registration of a security given by the company, *e.g.*, a chattel mortgage can not be said to have been finally decided in Ontario. The right was doubted by the Court of Appeal in *In re Rainy Lake Lumber Co.* (1888), 15 A. R. 749, asserted by the decision in *National Trust* v. *Trusts and Guarantee* (1912), 26 O. L. R. 279 (Teetzel, J.), while Riddell, J., in *Re Canadian Shipbuilding Co.* (1912), 26 O. L. R. 564, held that a liquidator not being a creditor or a purchaser for valuable consideration could not take advantage of the provisions of the Bills of Sale and Chattel Mort-

gage Act and other like statutes, and adopted the view that the liquidator stood in this regard in no higher position than the company. The correctness of the decision in *National Trust* v. *Trusts and Guarantee* has been greatly doubted, and it is understood that the case was set down for appeal but was settled before argument. The expression of opinion to the same effect in *Re Canadian Camera Co.* (1901), 2 O. L. R. 679, by Street, J., is only a dictum and was not necessary to the decision. Since the decision of Teetzel, J., above referred to, however, the practice of registering trust deeds as chattel mortgages has become general where they purport to give a security such as was in question in *National Trust* v. *Trusts and Guarantee.* The point is also mentioned or discussed in the following cases:—*Re Anderson* (1877-78), 2 A. R. 24; *Parkes* v. *St. George* (1883), 2 O. R. 342, 347; *Kitching* v. *Hicks* (1885), 6 O. R. 739, 745; *Harrison* v. *Nepisiguit* (1912), 11 E. L. R. 314; *Re William Hamilton Mfg. Co.* (1909-10), 1 O. W. N. 61, 421. Sect. 33.

In some cases the rights and powers possessed by the liquidator exceed those which the company itself could have asserted. See the following cases: *Waterhouse* v. *Jamieson* (1870), L. R. 2 H. L. Sc. 29; *In re London Celluloid Co.* (1888), 39 Ch. D. 190, 204; *In re Ebsworth and Tidy's Contract* (1889), 42 Ch. D. 23; *In re Sharpe, Masonic and General Life Assurance Co.* v. *Sharpe,* [1892] 1 Ch. 154; *In re Florence Land and Public Works Co., Nicol's Case* (1885), 29 Ch. D. 421; *In re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch. D. 519.

Receivers.

The authority of a liquidator is paramount to that of receivers appointed on behalf of mortgagees of the company and they will be discharged on motion although they have been appointed before the liquidator was appointed: *Campbell* v. *Compagnie Générale de Bellegarde* (1876), 2 Ch. D. 181; *Tottenham* v. *Swansea Zinc Ore Co.* (1884), 53 L. J. Ch. 776; *British Linen Co.* v. *South American and Mexican Co.* (1894), 1 Ch. 108.

Appeal

A liquidator may appeal from any order without the leave of the Court, but in such case he does so at

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Powers and duties of liquidator.

his own risk as to costs. See *In re Silver Valley Mines* (1882), 21 Ch. D. 381, where the practice as to appeals by liquidators is stated very fully. He may appeal against an order refusing him his costs out of the estate, or against an order for his removal: *In re Adam Eyton, Ex p. Charlesworth* (1887), 36 Ch. D. 299.

Where liquidators purchase the interest of a dissentient shareholder they have no power to release him from his liability to the creditors of the company: *In re Imperial Land Co. of Marseilles, Vining's Case* (1870), L. R. 6 Ch. 96.

Following assets.

Where an asset of the insolvent company has been illegally applied by one of its officers and there is sufficient identification of the fund to enable it to be followed, the liquidator can follow it into the hands of a third party: *Re Chandler Massey* (1911), 24 O. L. R. 513, (1912) 25 O. L. R. 211.

Where a trust company had possession as bailee or trustee for the plaintiffs of certain share certificates in which the trust company asserted that another company (of which the trust company was the liquidator) claimed an interest, the trust company was held liable, on its refusal to deliver up the certificates to the liquidator of the plaintiffs, to pay damages based on an estimate of what had been lost by the detention: *Elgin Loan Co.* (1905), 10 O. L. R. 41.

The statute does not prescribe the books to be kept by the liquidator except the bank pass-book referred to in ss. 43 and 57, but apart from specific enactment the liquidator is bound to keep true and complete accounts.

Books to be kept

Compare ss. 94, 95 and 157 of the Imperial Companies Act, 1862; s.s. 7, s. 95 of the Imperial Act is not incorporated in the Canadian Act. The powers conferred on the liquidator by our Act require for their exercise the sanction of the Court. By the Imperial Companies (Winding-up) Act of 1890 the liquidator is allowed a much wider discretion, except in the matter of carrying on business and in respect to the institution of litigation.

Compare 52 Vict. (Dom.), c. 32, ss. 11 and 12.

As a general rule the principle of estoppel is not applicable to anything said or done by the liquidator without the authority of the Court: *Re People's Trust Co.* (1918), 25 B. C. R. 138; *Re Ontario Bank, Massey and Lee's Case* (1913), 8 D. L. R. 243; 27 O. L. R. 192. Sect. 33.

34. The liquidator may, with the approval of the court, and upon such previous notice to the creditors, contributories, shareholders or members as the court orders,— Powers.

(*a*) bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as liquidator or in the name or on behalf of the company, as the case may be; Suits.

(*b*) carry on the business of the company so far as is necessary to the beneficial winding-up of the same; Business of company.

(*c*) sell the real and personal and heritable and movable property, effects and choses in action of the company, by public auction or private contract, and transfer the whole thereof to any person or company, or sell the same in parcels; Sale of property.

(*d*) do all acts, and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose use, when necessary, the seal of the company; General acts.

(*e*) prove, rank, claim and draw dividends in the matter of the bankruptcy, insolvency or sequestration of any contributory, for any sum due the company from such contributory, and take and receive dividends in respect of such sum in the matter of the bankruptcy, insolvency or sequestration, as a separate debt due from such contributory and ratably with the other separate creditors; Proving in bankruptcy.

(*f*) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company; Drawing and endorsing bills and notes.

(*g*) raise upon the security of the assets of the company, from time to time any requisite sum or sums of money; and, Raising funds.

(*h*) do and execute all such other things as are necessary for winding-up the affairs of the company and distributing its assets. General powers.

2. The drawing, accepting, making or endorsing of every such bill of exchange or promissory note, as aforesaid, on behalf of the company, shall have the same effect, with respect to the liability of such company, as if such bill or note had been drawn, accepted, made or endorsed by or on behalf of such company in the course of the carrying on of its business. Company liable on such notes and bills.

3. No delivery of the whole or of any part of the assets of the company shall be necessary to give a lien to any person No delivery of assets needed.

Sect. 34. taking security as aforesaid upon the assets of the company. R.S., c. 129, s. 31; 62-63 V., c. 42, s. 3.

Powers of liquidator.

The principles by which the Court will be guided in giving or withholding its sanction, are: (1) It will check anything that might prejudice the estate; (2) it will not sanction anything that is improper or contrary to the ordinary course of trade; (3) it will exercise its discretion for the benefit of the general body of creditors: *Re Commercial Bank Corporation of India and the East; Smith Fleming & Co.'s Case; Gledstane & Co.'s Case* (1866), L. R. 1 Ch. 538. As to the effect of absence of previous notice to creditors see *Williams* v. *Dominion Trust Co.* (1916), 31 D. L. R. 786; *Brigman* v. *McKenzie,* 6 B. C. R. 56.

See also *Re London Fence* (*No.* 1) (1911), 21 Man. R. 91.

Sub-section (a).

Suits (*a*).

A company notwithstanding that it is in liquidation retains the power to sue, but this must be exercised by the liquidator with the authority of the Court: *Kent* v. *Communauté* (1903), A. C. 221. If an action is proceeding to which the company is a party and the liquidator prosecutes or defends the action on behalf of the estate, the company must be regarded as the party litigant, and in the event of failure the costs will come out of the estate: *Re Winborn & Co.* (1905), 1 Ch. 413.

The liquidator is not a necessary or proper party to an action against the company brought before the winding up to set aside as fraudulent a chattel mortgage made to the company and continued against the company in liquidation: *Cole* v. *British Canadian Fur Trading Co.* (1918), 42 O. L. R. 587.

When an action is brought by the liquidator of a company in liquidation in the name of the company and he is not otherwise a party to it, he cannot be ordered personally to pay the costs of it: *Ontario Forge and Bolt Co.* v. *Comet Cycle Co.* (1896), 17 P. R. 156. See *Fraser* v. *Brescia Steam Tramways Co.* (1887), 56 L. T. 771; and *Re Cosmopolitan* (1893), 15 P. R. 185, a case under the Ontario Winding-up Act.

If the action is brought in his own name he is personally liable for costs, notwithstanding that he obtained leave from the Court to sue: *Jackson* v. *Cannon* (1901-4), 10 B. C. R. 73. As to the discretion of the Court in awarding costs out of the estate, see *Re Transcontinental Townsite* (1915), 33 W. L. R. 241.

A creditor of the company may intervene in an action begun by the liquidator: *Community of Sisters of Charity* v. *Bastien* (1902), Q. R. 11 K. B. 64. As to the extent of this right of intervention see *Kent* v. *Community* (1901), Q. R. 19 S. C. 556. A creditor may also apply for leave to bring an action in the name of the liquidator: *Re Bailey Cobalt* (1915), 8 O. W. N. 433.

Actions begun before the liquidation should be continued in the name of the company—a fresh action should not be begun: *Ross et al.* v. *Perras* (1894), 5 R. J. Q. (S. C.) 470.

The liquidator of a company in liquidation cannot begin proceedings against the debtors of that company without the previous consent of the Court on notice to creditors, contributories, shareholders or members as the Court prescribes, and it is not sufficient to seek that consent in the case of proceedings already begun against the debtors of the company: *Ross et al.* v. *Perras* (1894), 5 R. J. Q. (S. C.) 470.

The liquidator of a company must be specially authorized to institute an action for the recovery of a claim due the company, and a general authorization to recover all the company's assets is not sufficient: *Freygang* v. *Daveluy* (1892), 2 R. J. Q. (S. C.) 505.

The liquidator of an insolvent company represents the creditors of that company for actions which belong to the creditors themselves. Therefore the action to nullify a payment made by the company to a creditor who knew the insolvent state of that company, being of the nature of an action "*paulienne*," may be begun by the liquidator: *Kent* v. *Blandy & Provost* (1896), 19 Q. R. (S. C.) 255.

As to reversal of direction to bring action on appeal, see *Re Auto Top, &c., Co., Ltd.* (1916), 10 O. W. N. 76, 129.

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Suits. Sub-sec. (a) continued.

Section 34 (a) read with Section 20 is wide enough to justify a summary application to the Court to place a contributory on the list instead of applying for leave to bring an action for specific performance of a contract to take shares, where the company before insolvency is entitled to apply for rectification of the register: *Liquidator of the Monarch Oil Co.* v. *Chapin* (1917), 37 D. L. R. 772.

In British Columbia the leave of the Court to continue a proceeding begun by the company may be granted to the liquidator on an *ex parte* application: *Goldstein* v. *Vancouver Timber and Trading Co.* (1912), 4 D. L. R. 172. Proceedings to enforce the liability of contributories are properly brought by the liquidator and not by the petitioner: *Re Sarnia Oil Co.* (1884), 10 P. R. 435.

See also *Comic Opera* v. *Desaulniers* (1902-6), 7 Que. P. R. 83; *Comet Motor* v. *Dominion Mutual* (1910), 11 Que. P. R. 314; *Standard Mutual* v. *Dominion Mutual, &c., Co.* (1910), 11 Que. P. R. 392; *Ruffer* v. *Rattray* (1911), Q. R. 39 S. C. 345; *Lafferre* v. *Banque St. Jean* (1911), 17 Rev. Leg. N. S. 428; *Fecteu* v. *Ideal Confectionery, &c., Co.* (1911), 12 Que. P. R. 360; *Common* v. *McCaskill* (1897), Q. R. 13 S. C. 282; *Re E. Canada Pulp, &c., Co.* (1912-3), 14 Que. P. R. 351; *Bank of Hamilton* v. *Kramer-Irwin* (1912), 1 D. L. R. 475.

Failure to obtain leave.

In *Sarnia Agricultural, &c., Co.* v. *Hutchinson* (1889), 17 O. R. 676, Proudfoot, J., held that an objection, taken at the trial after evidence had been given, that the liquidator had not obtained the authorization of the Court, was too late. *Semble,* that the proper course is to move in Chambers to dismiss the action for want of authority, *ibid.*

In *Hamilton* v. *Hamilton Steel and Iron, &c., Co.* (1911), 23 O. L. R. 270, 281, the judgment of Britton, J., at the trial indicates that an application to stay is the proper procedure, and none having been made the objection of want of approval was not given effect to.

As to whether the liquidator should sue in his own name or in that of the company depends on the nature

Whether liquidator should sue in own name or in name of company.

of the cause of action and whether he therein represents the company or the creditors and contributories. There are . . . many cases in which he may sue in his own name, as *e.g.*, to impeach some act or deed of the company before winding-up which is made voidable in the interest of creditors and contributories. . . . Whenever the object of the action is to recover a debt, or to recover or protect property the title to which is in the company, the action should be brought in the name of the company: *Kent* v. *Communauté* (1903), A. C., per Lord Davey, at p. 226. If the liquidator has incorrectly brought the action in his own name but the defendant has not objected to the form of the action but has admitted the debt and pleaded a set off, leave should be given to amend, *ibid.*

Illustrations of the distinction are to be found in *Hyde* v. *Thibaudeau* (1911), Q. R. 20 K. B. 200 (1910) 11 P. R. 419; *Lapierre* v. *Banque St. Jean* (1911), 17 R. L. N. S. 428. See also *Royal Paper Box Co.* v. *Canada Cement, &c., Co.* (1915), 48 Que. S. C. 287.

In *Crain* v. *Wade* (1917), 37 D. L. R. 412, the liquidator sued in his own name, and this was regarded as unobjectionable as he was held to be suing as trustee for the company; see p. 417 of the report.

Where a liquidator desires to reimburse himself out of the assets in respect of litigation here, the winding-up and the assets being in the control of the Court in Quebec where the order was made, the Quebec Court which has control of the assets alone can make the order: *Dominion Cold Storage Co.* (1897), 17 P. R. 468.

Discovery by liquidator.

As the liquidator represents the company in litigation he may be compelled to make discovery. Therefore, where an alleged contributory took steps to be relieved from his liability, the liquidator was held to be bound by the same rules as to answering questions and producing documents as if a bill had been filed against the company and he had been made a defendant for the purpose of discovery. In *Barned's Banking Co. Ex parte Contract Corporation* (1867), L. R. 2 Ch. 350; *In re Contract Corporation, Gooch's Case* (1871), L. R. 7 Ch. 207.

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Sub-section (b).

Liquidator carrying on business of company.

Unless the liquidators are authorized to carry on the business of the company, their duty is only to wind it up, and they are bound to distribute the assets according to the liabilities as they exist at the date of the stoppage; they have no power to alter those liabilities by making a fresh contract: *In re East of England Banking Co.* (1868), L. R. 4 Ch. 14; *In re Steel Co. of Canada* (1885), W. N. 79.

As to the effect of adopting an outstanding contract see *Re Bishop Construction Co., Ltd.* (1914), 15 D. L. R. 911.

Authority to carry on the company's business does not authorize the liquidator of a trust company to part with the company's right of retainer, which involving a reduction of the assets would require a substantive approval of the Court under s. 36: *Williams* v. *Dominion Trust Co.* (1916), 31 D. L. R. 786.

If the liquidator supplies goods in pursuance of a contract made before the winding-up commenced the purchaser cannot set off a debt incurred to himself by the company prior to the winding-up: *In re Ince Hall Rolling Mills Co.* v. *Douglas Forge Co.* (1882), 8 Q. B. D. 179; *Mersey Steel and Iron Co.* v. *Naylor* (1882), 9 Q. B. D. 648. See also *In re Oriental Hotels Co., Perry* v. *Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *In re Regent's Canal Iron Works Co.* (1875), 3 Ch. D. 411; *In re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1885), 30 Ch. D. 216; *Wiltshire Iron Co.* v. *Great Western Ry. Co.* (1871), L. R. 6 Q. B. 101, 776; *In re English Joint Stock Bank, Ex p. Harding* (1867) L. R. 3 Eq. 341; *In re Llangennech Coal Co.* (1887), 56 L. T. 475.

Sub-section (c).

Sale of property.

The power to sell is conferred on the liquidator; it is not exercisable by the Court, but by the liquidator after first having obtained the Court's approval. Consequently there must be a valid contract in existence between the liquidator and the purchaser before the liquidator can be compelled to carry out a

proposed sale: *Re Canada Woollen Mills* (*Long's Appeal*) (1905), 9 O. L. R. 367. An agreement to purchase the assets of an insolvent company at a certain rate on the dollar of unascertained claims of the creditors is of doubtful validity: *Re Bolt and Iron Co.* (1885), 10 P. R. 434. Where the powers of the Court have been delegated to the Official Referee, and the latter has approved of a sale there is no need to have the sale confirmed by a Judge in Chambers: *Re McCann Knox Milling Co.* (1909-10), 1 O. W. N. 579. As to the meaning of the phrase "free from encumbrances" in a sale by a liquidator, see *Dominion Linen Mills* v. *Langley* (1911), 19 O. W. R. 648, affirmed (1912), 46 S. C. R. 633. Until forms, rules and regulations are made under s. 135 the ordinary Chancery practice in sales will apply. For the practice and what must be shown where a private sale is desired, see *Re Bolt and Iron Co.* (1885), 10 P. R. 434. Sect. 34.

A liquidator in England for the voluntary winding up there of a company incorporated under Imperial Act, 1862, cannot intervene in Quebec to prevent Canadian creditors realizing there on assets in the Province. *Quære,* if such liquidator has any standing before the Canadian Court: *Powis* v. *Quebec Bank* (1893), 2 Q. R. (Q. B.) 566; see also on this point *British Canadian Lumbering and Timber Co.* v. *Grant* (1887), 12 P. R. 301.

Sub-section (g).

Raising funds.

The liquidator should apply to the Court for leave to borrow before obtaining the loan. Where the order authorizing the loan provided that the same should be a first mortgage on all the assets of the company subject only to existing liens, charges and encumbrances, it was held that the lender's lien took priority over the costs and charges of the winding-up proceedings, including the fees of the liquidator and solicitor: *Keyes* v. *Hanington* (1913), 13 D. L. R. 139.

Section 92 of the Act only gives priority to the winding-up costs over claims against the company in existence at the time of going into liquidation, *ibid.*

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When solicitor may be appointed.

35. The liquidator may, with the approval of the court, appoint a solicitor or law agent to assist him in the performance of his duties. R.S., c. 129, s. 32.

Compare Imperial Companies Act, 1862, s. 97, and Imperial Companies (Winding-up) Act, 1890, s. 12 (4).

A liquidator may not appoint his partner: *In re Universal Private Telegraph Co.* (1871), 23 L. T. 884.

It is preferable to have the proceedings under an order for winding-up a company conducted by solicitors who are totally unconnected with the company to be wound up: *Re Joseph Hall Manufacturing Co.* (1884), 10 P. R. 485.

A solicitor should not act for the liquidator who is acting also for claimants whose claims must be contested by the liquidator: *In re Trueman's Estate* (1872), L. R. 14 Eq. 278; *Re Anglo M. Co.* (1876), 24 W. R. 128.

In a proceeding for the winding up of a company, a solicitor who is acting for claimants whose claims must be contested by the liquidator, cannot obtain the sanction of the Court to his acting also as solicitor for the liquidator. Nor will the Court sanction the appointment of a special solicitor to act for the liquidator in the matter of the contested claim. The winding up must be prosecuted by one disinterested solicitor whose services will not be divided by the assertion of antagonistic claims: *Re Charles Stark Co.* (1893), 15 P. R. 471.

Costs of Solicitor of Liquidator.

The costs of the solicitor employed come out of the assets next after the liquidator's necessary disbursements and before his remuneration. The solicitor has no claim against him personally for the costs of the winding-up: *Ex p. Watkins* (1875), 1 Ch. D. 130; *In re Sanitary Burial Assn.*, [1900] 2 Ch. 289.

This is quite different from the case of costs which the liquidator is ordered to pay to an adverse litigant, and such costs must be paid in priority to costs due to

the solicitor of the liquidator: *In re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33. Sect. 35

Upon the reference for the winding-up of a company, the referee appointed a firm of solicitors to represent the general body of creditors, and ordered that they should be notified to attend whenever he so directed, and that their costs as between solicitor and client should be paid out of the assets. Held that this class of order and liability was not favoured by the Courts and should be invoked and attendance thereunder had, only when there was any special question on which the appearance of some one to represent the creditors was desirable; that attendances and services should not be paid for out of the assets except where contemporaneously approved of by the referee; and it was not proper practice to extend this at the close of the proceedings by obtaining a certificate from him that had he been applied to from time to time he might have provided for other attendances and services: *Re Drury Nickel Co.* (1895), 16 P. R. 525.

Debts due to the company may be compromised.

36. The liquidator may, with the approval of the court, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, demands and matters in dispute in any way relating to or affecting the assets of the company or the winding-up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms, as are agreed upon.

Security may be taken.

2. The liquidator may take any security for the discharge of such calls, debts, liabilities, claims, demands, or disputed matters, and give a complete discharge in respect of all or any such calls, debts, liabilities, claims, demands, or matters. R.S., c. 129, s. 33.

Compare Imperial Companies Act, 1862, ss. 159 and 160, and ss. 63 and 64 of this Act as to compromise of creditors' claims. This section has been construed very widely in the earlier English cases: *Commercial Bank Corporation of India* (1869), L. R. 8 Eq. 241.

The Court has no jurisdiction to compel the liquidator to compromise with a creditor: *International Contract Co., Hankey's Case* (1872), 26 L. T. 358; or with a contributory: *East of England Banking Co., Pearson's Case* (1872), L. R. 7 Ch. 309.

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Compromise of debts.

Even when a compromise was recommended by a liquidator, it could formerly be frustrated by an opposing minority: *Re Sun Lithographing Co.* (1893), 24 O. R. 200.

See the following English cases as to rights of dissentient minorities: *In re Albert Life Assurance Co.* (1871), L. R. 6 Ch. 381; *New Zealand Banking Corporation, Ex p. Hankey* (1869), 21 L. T. 481; *Re Smith, Knight & Co.* (1868), 16 W. R. 1104.

The liquidator of an insolvent company brought in for approval an agreement with certain parties for the sale to them of its assets, at a price equal to twenty-five cents on the dollar of the claims of the creditors of the company, "as may be admitted or adjudicated," in addition to the cost of the liquidation proceedings to be taxed by the taxing officer, and the remuneration of the liquidator to be settled by the Master. There was no mode of admitting or adjudicating on such claims provided in the agreement. The agreement was opposed by certain creditors, and thereupon the proposed purchasers withdrew from it. Held, (1) That if the creditors' claims were to be admitted by and between the parties, the agreement was conditional, and the purchasers withdrawing before ascertainment left the agreement imperfect; (2) That by not providing a mode of admitting or adjudicating upon the creditors' claims, the agreement was ambiguous, and parol evidence would have to be adduced to explain it; (3) That for these reasons the agreement was incapable of being enforced, and could not be approved. *Quære,* whether an agreement to purchase the assets of a company at a certain rate on the dollar of the unascertained claims of the creditors of such company would be valid: *Re Bolt and Iron Co.* (1885), 10 P. R. 434.

In sanctioning a compromise the Court is exercising a judicial discretion, and therefore will not give its sanction without having the means of itself forming an opinion of the propriety of the compromise proposed: *Ex p. Totty* (1860), 1 Dr. & Sm. 273; *Morin & Bilodeau* (1898), Q. R. 8 Q. B. 330.

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If the necessary consents to a compromise have in fact been given, the Court will not be astute to find technical defects in the proceedings: *Re Dynevor, etc., Collieries Co.* (1879), 11 Ch. D. 605.

Since the liquidator has no power to release any one (except under authority of the Court) without the Court's approval, laches on his part will not release contributories: *Re Ontario Bank* (1912), 8 D. L. R. 243, per Garrow, J.A., at p. 247.

The Court may rescind a compromise made with its sanction, if obtained by misrepresentation: *Ex p. Clarke* (1866), 14 W. R. 856, and see *Central Darjeeling Tea Co.* (1866), W. N. 361; *Ex p. Carstin* (1862), 10 W. R. 457.

The power of the Court to authorize the liquidator to act in the name of the company and to settle pending proceedings is a discretionary power. The liquidator is not obliged to consult the creditors of the company before applying to the Court for authority to effect a settlement: *Morin* v. *Bilodeau* (1898), Q. R. 8 Q. B. 330.

The liquidator can not without the consent of the Court accept less than payment in full: *Re Ontario Bank* (1912), 8 D. L. R. 251;-27 O. L. R. 192; *Williams* v. *Dominion Trust Co.* (1916), 31 D. L. R. 786; *Re Laurie Engine Co.*, 7 Que. P. R. 431.

Creditors may be compromised.

37. The liquidator may, with the approval of the court, make such compromise or other arrangement with creditors or persons claiming to be creditors of the company as he shall deem expedient. R.S., c. 129, s. 61.

Compare Imperial Companies Act, 1862, ss. 159 and 160.

It was held in *Re Sun Lithographing Co.*, 24 O. R. 200, that there was no power under this section to enforce a compromise upon a dissentient minority, or to compel a liquidator to accept a compromise. This has been remedied by the amending Act, 62-63 Vict. (Dom.), c. 43, s. 3; now s. 64 of the Act: see *Ward* v. *Mullin*, Q. R. (1905), 14 K. B. 49.

Sect. 38.

Court may provide as to powers of liquidator.

38. The court may provide, by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by this Act, without the sanction or intervention of the court. 52 V., c. 32, s. 12.

For an example of the application of this section see *In re Victoria-Montreal Fire Insurance Co.* (1901-2), 4 Que. P. R. 315, where an order was made covering all cases in which the amount involved was under $100. The Court may under this section give the liquidator general authority to bring actions without application to the Court: *Kendall* v. *Webster* (1909-10), 15 B. C. R. 268.

Appointment of Inspectors.

Inspectors.

39. The court may appoint, at any time when found advisable, one or more inspectors, whose duty it shall be to assist and advise the liquidator in the liquidation of the company.

The duty of the inspector is to assist and advise the liquidator in the liquidation; his remuneration is provided for by s. 41. So long as he holds the office an inspector is disqualified from becoming a purchaser of the company's assets without the consent of his *cestuis que trust, i.e.,* the contributories and creditors, or at least without an order of the Court after notice to all concerned; for he is in the position of a trustee for sale of the assets of the insolvent company: *In re Canada Woollen Mills* (*Long's Appeal*) (1905), 9 O. L. R. 367, per Moss, C.J.O., at p. 368. See also *Morrison* v. *Water* (1892), 19 A. R. 622.

In the event of an inspector becoming a purchaser while the fiduciary relationship continues, the purchase may be set aside on the motion of the liquidator or a creditor: *In re Canada Woollen Mills, supra,* and (1904), 8 O. L. R. 581; *Gastonquay* v. *Savoie* (1898-99), 29 S. C. R. 613. Where the transaction is complete the creditors may be entitled to a reference to ascertain what profit, if any, the inspector has derived therefrom: *Segsworth* v. *Anderson* (1894-5), 24 S. C. R. 699.

Remuneration of Liquidators and Inspectors. Secs. 40-41.

40. The liquidator shall be paid such salary or remuneration, by way of percentage or otherwise, as the court directs, upon such notice to the creditors, contributories, shareholders or members, as the court orders. Remuneration.

2. If there is more than one liquidator, the remuneration shall be distributed amongst them in such proportions as the court directs. R.S., c. 129, s. 28. Distribution of.

41. The court shall determine the remuneration, if any is deemed just, of the inspector or inspectors. 62-63 V., c. 42, s. 2. Remuneration of inspectors.

Remuneration.

Compare Imperial Companies Act, 1862, s. 93. Liquidator's remuneration.

The intention of s. 40 of the Winding-up Act is that the remuneration is not necessarily to be increased because three liquidators are paid instead of one. The recompense for services is usually a percentage based on the time occupied, work done, and responsibility imposed, and when fixed goes to the liquidator, and, if more than one, is distributed amongst them: *Re The Central Bank of Canada* (1888), 15 O. R. 309; *Re Waldron, Drouin Co.* (1916), 17 Q. P. R. 358.

The remuneration of the liquidators ought not to be fixed at the time of their appointment; but the Court adopted the suggestions of the meetings as to the proportions in which the several liquidators should share in the amount to be allowed: *Re Commercial Bank of Manitoba* (1893), 9 M. R. 342.

In fixing the compensation of the liquidator it is proper to take into account the amount adjusted or set off, but not actually received. A commission of 2¼ per cent. having been allowed on the amount collected, a further commission of 1¼ per cent. on $231,000 adjusted or set off was allowed. The compensation should be spread over the whole period of liquidation so as to insure vigilance at all stages: *Re Central Bank, Lye's Claim* (1892), 22 O. R. 247; see also *Re Central Bank* (1890), 26 C. L. J. 24.

The liquidator should furnish proof of the services rendered, work done, etc.: *Exchange Bank* v. *Campbell*

Secs. 40-41.

(1885), 15 R. L. 373; *Re Assiniboine Valley Co.* (1889), 6 M. R. 184.

Remuneration of liquidators and inspectors.

The Court in Manitoba, in following the same principle as the English Winding-up Acts, reduced the scale adopted there allowing $5.00 a day for each day of eight hours, and $100 additional for preparing the report: *Re Saskatchewan Coal Mining Co.* (1890), 6 M. R. 593.

In Manitoba the Court has no power to refer to the Master the consideration of the amount to be allowed to the liquidator: *Re Saskatchewan Coal Mining Co., supra;* but see 52 Vict. (Dom.), c. 32, s. 20, now s. 110.

No charge can be made by liquidator for time spent in procuring his own appointment or opposing his discharge. Scale of remuneration and business for which it is allowed discussed: *Re Assiniboine Valley Stock and Dairy Co.* (1889), 6 M. R. 184.

No fixed scale of remuneration has been adopted in Ontario. As to scale of remuneration in England, see Palmer, 11th ed., Part II., p. 331.

Priority of remuneration.

As to priority of the liquidator's remuneration and disbursements in case of a deficiency of assets, see the following cases:—*London Metallurgical Co.,* [1895] 1 Ch. 758; *Re Massey* (1870), L. R. 9 Eq. 367; *Re Dronfield Silkstone Co.* (1883), 23 Ch. D. 511; *Re Dominion of Canada Plumbago Co.* (1884), 27 Ch. D. 33; *Batten* v. *Wedgewood Coal Co.* (1885), 31 Ch. D. 346; *In re Sanitary Burial Assn.,* [1900] 2 Ch. 289; *Re Baden Machinery Co.* (1906), 12 O. L. R. 634.

The remuneration of the liquidator ranks after the rights of mortgagees and debenture-holders, but in priority to unsecured creditors: *Re Regent's Canal* (1875), 3 Ch. D. 411; *Re Ormerod, Grierson & Co.* (1890), W. N. 217.

Under the prevailing practice, the liquidator is not allowed charges made for guarantee premiums on bonds of guarantee companies for fidelity of liquidator and proper distribution of the estate.

But in *Re Owen Sound Lumber Co.* (1918), 14 O. W. N. 309, the cost of the bond was allowed as a disbursement by the Local Master.

Secs. 40-41.

As to the question of remuneration of liquidators in the Central Bank Case, after a very full consideration of the case, the Master decided to allow two rates. (1) the lowest authorized by the Insolvent Act of 1875, viz., 1¼ per cent., and (2) the lowest rate sanctioned by the Court in *Thompson* v. *Freeman* (1868), 15 Gr. 384, namely 3 per cent. The higher rate allowed on all moneys collected after pressure; the lower rate on debts and interest paid at maturity: *In re Central Bank, Lye's Claim* (1892), 22 O. R. 247.

A liquidator is not entitled to claim fees based on the tariff of the association of chartered accountants of which he is a member: *Re Waldron, Drouin Co.* (1916), 17 Que. P. R. 358.

Creditors can have the liquidator's remuneration fixed by a Taxing Officer, see *Re Laurie Engine Co.* (1906), 8 Que. P. R. 59.

In *Farmers' Loan and Savings Co.* (1904), 3 O. W. R. 837, the Court awarded a lump sum for the receipt and disbursement of the corpus and the care and management of the estate for a period of years. See also *In re Williams* (1902), 4 O. L. R. 501. The liquidator has no lien for his fees: *Ross* v. *Walker* (1908-9), 10 Que. P. R. 428.

The liquidator's solicitor has no claim on the creditors for his fees: *Beaubien* v. *Corticelli Co.* (1912-13), 14 Que. P. R. 194.

Depositing in Bank.

Moneys to be deposited in bank.

42. The liquidator shall deposit at interest in some chartered bank or post office savings bank, or other Government savings bank designated by the court, all sums of money which he has in his hands belonging to the company, whenever and so often as such sums amount to one hundred dollars. R.S., c. 129, s. 35.

Compare s. 45 of Insolvent Act (1875), Dominion.

Separate account of same, in name of liquidator as such

43. Such deposits shall not be made in the name of the liquidator individually, on pain of dismissal; but a separate account shall be kept for the company of the moneys belonging to the company in the name of the liquidator as such liquidator. R.S., c. 129, s. 36.

Sect. 44.

Balance on hand by liquidator to be deposited after winding-up.

44. The liquidator shall, within three days after the date of the final winding-up of the business of the company, deposit at interest in the bank appointed or designated, as hereinbefore provided, any money belonging to the estate then in his hands not required for any other purpose authorized by this Act, with a sworn statement and account of such money, and that the same is all that he has in his hands. R.S., c. 129, s. 40.

Money paid in by the liquidator under section 41 of R. S. C. 129, now s. 137, having been paid out to a person not entitled thereto, the Receiver-General was held to have a *locus standi* before the expiry of three years to apply for and was granted an order compelling repayment into Court of the fund: *Hogaboom's Case* (1897), 24 A. R. 470.

Penalty for neglect.

45. In case any liquidator shall not, within three days after the date of the final winding-up of the business of the company, deposit in the bank, appointed or designated as hereinbefore provided, any money belonging to the estate of which he is such liquidator, then in his hands, he shall be deemed a debtor to His Majesty for such money, and may be compelled as such to account for and pay over the same. R.S., c. 129, s. 40.

Court Discharging Functions of Liquidator.

If no liquidator.

46. If at any time there is no liquidator, all the property of the company shall be deemed to be in the custody of the court. R.S., c. 129, s. 25.

Compare Imperial Companies (Winding-up) Act, 1890, s. 4, s-s. 4, and Imperial Companies Act, 1862, s. 92.

An order for the sale of an asset by the Court after the liquidator's discharge and an order vesting such asset in the purchaser have been granted under these sections.

Provision for discharge of liquidator and distribution by the court.

47. Whenever a company is being wound up, and the realization and distribution of its assets has proceeded so far that in the opinion of the court it becomes expedient that the liquidator should be discharged, and that the balance remaining in his hands of the moneys and assets of the company can be better realized and distributed by the court, the court may make an order discharging the liquidator, and for payment, delivery and transfer into court, or to such officer or person as the court may direct, of such moneys and assets, and the same shall be realized and distributed, by or under the direction of the court, among the

persons entitled thereto, in the same way, as nearly as may be, as if the distribution were being made by the liquidator. Sect. 47.

2. In such case the court may make an order directing how the books, accounts and documents of the company and of the liquidator may be disposed of, and may order that they be deposited in court or otherwise dealt with as may be thought fit. 55-56 V., c. 28, s. 2. Disposal of books and documents.

Compare s. 99 of Insolvent Act (1875) (Dom.).

Discharge of Liquidator.

The Act contains no provision enabling the liquidator to apply for his discharge after completing the winding-up. No difficulty, however, arises in practice. The liquidator having completed the winding-up of the company's affairs, passes his accounts before the Official Referee upon notice to all parties. The costs of the solicitors for the liquidator and for the creditors are taxed. After the accounts have been passed and the sums remaining in the liquidator's hands for distribution have been paid out to the parties entitled and proof of such payment has been furnished to the Official Referee, the liquidator applies for and obtains an order directing his discharge and the cancellation of the liquidator's bond.

When the liquidator to an insurance company petitioned for his discharge as liquidator, and it appeared that he had appropriated to himself from the funds received, an amount exceeding the remuneration fixed by the Court and the evidence did not disclose the exact amount in which he was indebted to the estate, the Court refused to grant his discharge without fixing any amount to be paid by him as a condition of obtaining his discharge: *Plender* v. *Fitzgerald* (1888), 5 M. L. R. (Q. B.) 446.

Contributories.

48. As soon as may be after the commencement of the winding-up of a company the court shall settle a list of contributories. R.S., c. 129, s. 42. List of contributories.

49. In the list of contributories, persons who are contributories in their own right shall be distinguished from persons who are contributories as representatives of or liable for the debts of others. R.S., c. 129, s. 43. Classes of contributories distinguished.

Secs. 48-50.

Adding heirs to list.

50. It shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, but such heirs or devisees may be added as and when the court thinks fit. R.S., c. 129, s. 43.

Compare Imperial Companies (Consolidation) Act, 1908, ss. 163 and 124.

Contributories.

The term "contributory" is defined by s. 2(g) of the Act as a "person liable to contribute to the assets of a company under this Act; and in all proceedings for determining the persons who are to be deemed contributories and in all proceedings prior to the final determination of such persons, it includes any person alleged to be a contributory." See the notes to s. 2 (*g*).

While the foregoing definition is wide enough to include any person indebted to the company the term is limited in its application to the liability of shareholders as such: *Re Central Bank and Yorke* (1888), 15 O. R. 625; *Re Monarch Bank* (1914), 32 O. L. R. 207. See also the notes to section 51, which section gives the clue to the meaning of the term contributory: *Re Central Bank and Yorke, supra; In re National Savings Bank Association* (1865-6), L. R. 1 Ch. App. 547, 551.

On the other hand a shareholder who owes nothing on his shares and is, therefore, not liable for calls, is properly placed on the list of contributories in order that he may be repaid his proper share out of the surplus assets: *Re Monarch Bank* (1914), 32 O. L. R. 207.

Settling list of contributories.

One of the first duties of the liquidator is to make out a list of the contributories of the company from the books and papers received by him, setting forth the name, address, description and the number of shares in respect of which each contributory appears to be liable. After making this list he should obtain a summons from the Court to settle the list of contributories, and serve a copy of such summons, or a notice thereof, on each of the persons included in the list.

Practice.

Upon the return of this appointment before the Master the liquidator should attend with the requisite documents to prove the liability of the contributories where necessary, but if the case is opposed, it is usual

to fix a special day for its hearing. In that case the evidence to fix the alleged contributory is first produced by the liquidator, and then the alleged contributory produces his evidence in opposition. On the hearing of the application to settle the list of contributories generally it is necessary for the liquidator to produce an affidavit proving the service upon each of the contributories of the notice above mentioned. Such notice may, however, be sufficiently given, if the Master has so directed, by posting the notice to each of the contributories at his place of residence as shown by the books of the company. It is not the practice in Ontario as it has been in England for the liquidator himself to sit judicially to determine whether the alleged contributory ought or ought not to be settled upon the list, but the liquidator brings into the office of the Master to whom the reference in the winding up has been assigned a list of such contributories as from the books he alleges ought to be settled upon such list; and these persons are thereupon, after the notice above mentioned, heard before the Master and their rights determined. From the decision of the Master so given an appeal lies to the Court as in ordinary cases. Upon the hearing of such a contest the Master may issue an order embodying his decision in respect to the question and awarding costs to either party. Secs. 48-50.

As to the principles to be followed in settling contributories on the list, see *Re Atlas Loan Co.* (1910) 30 C. L. T. 366. For the effect of laches by the liquidator: see *Re Ontario Bank* (1912) 8 D. L. R. 243.

See also *La Cie. Villeneuve* v. *Price Bros.* (1909) Q. R. 36 S. C. 395; *Victoria* v. *Derome* (1902) Q. R. 21 S. C. 319; *Re Banque de St. Jean* (1910) 10 Que. P. R. 223; *Re Harris* (1905) 5 O. W. R. 649, doubted in *Re Cornwall Furniture Co., infra.*

Where the court's powers have been delegated to a Local Master, such officer has jurisdiction in settling the list of contributories to inquire whether shares, in respect of which certificates are held purporting to be fully paid up, have in fact had anything paid thereon: *Re Cornwall Furniture Co.* (1909) 18 O. L. R. 101. In Jurisdiction of Master.

Secs. 48-50.

the absence of fraud, however, neither the court nor the delegated officer will inquire into the adequacy of any consideration taken by the company in lieu of money payment for the shares: *Re Hess Mfg. Co.* (1893-4) 23 S. C. R. 644, 653, as explained in *Re Cornwall Furniture Co., supra.*

Settling list of contributories.

The liquidator and the court must proceed in the manner provided by the Act. Thus it has been held that the liquidator cannot by petition pray to have the persons therein named declared contributories and be summoned to hear themselves so declared contributories: *Frank* v. *Boston Shoe* (1915) 24 Que. K. B. 267. A holder of fully paid shares may be placed on the list of contributories on the application of the liquidator or on his own application: *Re Monarch Bank* (1914) 32 O. L. R. 207, *per* Maclaren, J.A., at p. 213; *Re Colonial Assurance Co.* (1916) 29 D. L. R. 488; 26 Man. R. 324.

When an alleged contributory claims that some other person is liable in his stead he should bring such other person before the court: *Re European Arbitration, Thomas Brown's Case,* 17 Sol. J. 289; *Re European Arbitration, Read's Case,* Reilly, 19; *Re European Arbitration, Minshall's Case,* L. T. 29.

But if he is entitled to have his name removed, the mere fact that there is no person who can be substituted, will not prevent him from enforcing his right. When, for instance, as in *Fyfe's Case* (1869) L. R. 4 Ch. 768, the transferee was dead and had no legal representative, or as in *Bentick's Case* (*European Arbitration*) 18 Sol. J. 234, shares had been transferred to an infant and the transferee could not be found, the infant's name was struck off; and see *Re Wilson* (1873) L. R. 8 Eq. 240; and *Curtis' Case* (1868) L. R. 6 Eq. 455; and see *Re Central Bank and Hogg* (1890) 19 O. R. 7.

Costs of Contributories.

Costs of contributories.

If a contributory successfully resists the application to put him on the list he will be entitled to costs out of the estate. *Nation's Case* (1866) L. R. 3 Eq. 77; *Ship's Case,* 13 W. R. 450, 12 L. T. 728; *Emmer-*

son's Case (1866) L. R. 2 Eq. 231, 1 Ch. 433; *Coate's Case* (1874) L. R. 17 Eq. 169; *Lowe's Case* (1870) L. R. 9 Eq. 589; and even in some cases when the contributory is unsuccessful costs have been allowed. See *Cleland's Case* (1877) L. R. 14 Eq. 387, where decision turned on the construction of a new statute, and *Part's Case* (1870) L. R. 10 Eq. 622, which was a test case; see also *Walker's Case* (1866) L. R. 2 Eq. 554; *Ex p. Jeaffreson* (1871) 11 Eq. 109, and *In re Mutual Society* (1881) 18 Ch. D. 530. But except under special circumstances when a contributory contests his liability and fails he must pay the costs: *Gower's Case* (1868) L. R. 6 Eq. 77; *Re Birbeck Life, Ex p. Barry* (1865) 2 Dr. & Sm. 321, 13 W. R. 380; *Musgrave & Hart's Case* (1868) L. R. 5 Eq. 193; *Andrew's Case* (1868) L. R. 3 Ch. 161; *Ex p. Oakes & Peek* (1867) L. R. 3 Eq. 576 at p. 633. Secs. 48-50.

In *Hovenden's Case* (1884) 10 P. R. 434, costs were awarded against the liquidator personally, and he was left to his recourse against the estate. And see Buckley, 7th ed., 308, *et seq.*

A person whose name has been wrongly placed on the list of contributories does not, by delaying in making application to have it removed, thereby raise an equity against his right to relief: *Shewell's Case* (1867) L. R. 2 Ch. 387; *Fyfe's Case* (1869) L. R. 4 Ch. 768; *Hart's Case* (1868) L. R. 6 Eq. 512; *Nelson's Case* (1874) W. N. 196.

The costs of an action for calls, which had been discontinued by the liquidator on voluntary liquidation, were directed to be set off against any sum recovered by liquidator under originating summons: *In re United Service Assn.* [1901] 1 Ch. 97.

51. Every shareholder or member of the company or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company, or otherwise. Liability of shareholders and their representatives.

2. The amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act. R.S., c. 129, s. 44. Liability an asset.

Sect. 51.

Liability of shareholders.

The application of the section is limited to shareholders or members: *Re Winnipeg Hedge Wire Fence Co.* (1912) 1 D. L. R. 317. See also *Wiarton Beet Root Sugar Co., Freeman's Case* (1906) 12 O. L. R. 149, 152; *Re Monarch Bank* (1914) 32 O. L. R. 207; *Re Central Bank & York* (1888) 15 O. R. 625.

For cases of double liability on bank shares, see s. 52 and notes.

A person who is merely a debtor to the company is not a contributory, although in a sense he may be liable to contribute to the assets, and when shares are held by A in trust for B the latter is not a contributory: *King's Case* (1871) L. R. 6 Ch. 196, but it is otherwise where he is also beneficially interested: *Re Winnipeg Hedge and Wire Fence Co., supra.* And an equitable mortgagee of shares is not a contributory: *Sichell's Case* (1867) L. R. 3 Ch. 119.

As to what constitutes a person a shareholder or member, see the notes to s. 46 of the Dominion Companies Act.

It should be noted, however, that some of the defences open to a person where the company seeks to enforce his liability to it as a shareholder, are not available where the liquidator is proceeding under the Act after a winding-up has occurred and the rights of creditors and other contributories have intervened: see *Morris* v. *Union Bank* (1899-01), 31 S. C. R. 594; *Re Central Bank, Henderson's Case* (1889) 17 O. R. 110; *Re London Speaker* (1889) 16 A. R. 508; *Stephens* v. *Riddell* (1910) 21 O. L. R. 484.

An allottee of shares who has received notice of allotment and delays to exercise his right of repudiation until after the winding-up of the company has intervened will be liable as a contributory: *Barrett* v. *Bank of Vancouver* (1917) 36 D. L. R. 158.

Executors of deceased shareholder.

For the liability of executors and administrators of a deceased shareholder and of beneficiaries holding under unregistered transfer: see *Clarkson* v. *McLean* (1917-18) 42 O. L. R. 1.

Shareholder or member.

Where a person before the incorporation of the company signs an agreement to take shares he does

not thereby come within the section and is not liable to be placed on the list of contributories: *In re London Speaker* (1889) 16 A. R. 508, explaining *In re Queen City Refining Co.* (1886) 10 O. R. 264, and see *Tillsonburg* v. *Goderich* (1885) 8 O. R. 565; *In re Rosedale* (1889) 19 C. L. T. 311; *Kelly's Case* (1884) 7 O. R. 204; 12 A. R. 486; *Thames Navigation Co.* v. *Reid* (1886) 13 A. R. 303. But a subscriber before incorporation who is named in the letters patent as a shareholder, or in some other way becomes a member of the company is liable: *Re Haggart Bros.* (1892) 19 A. R. 582. Sect. 51. Incorporator.

A signatory to the memorandum of agreement accompanying the petition for incorporation under the Ontario Act becomes a shareholder on incorporation without allotment: *Re Nipissing Planing Mills* (1909) 18 O. L. R. 80. Qu., whether the same is true under the Dominion Act unless he appears in the charter. *Aliter* if the document signed is not the memorandum provided for by the Act: *Canadian Druggists* v. *Thompson* (1910-11) 2 O. W. N. 1213; (1911) 24 O. L. R. 108.

See also *Lafleur* v. *St. Amour* (1909) Q. R. 18 K. B. 400; *Re Dominion Milling Co.* (1915) 8 O. W. N. 496.

The mere fact that a person appears on the books of the company as a shareholder will not make him liable as such. It must be shewn that his name is there by authority: *Oakes* v. *Turquand* (1867) L. R. 2 H. L. 325; *Chapman and Barker's Case* (1866) L. R. 3 Eq. 361; *Somerville's Case* (1870) L. R. 6 Ch. 266; *Re Scottish Petroleum Co.* (1883) 23 Ch. D. 413.

After incorporation, when a person signs a stock subscription book, containing an agreement to take stock, and requesting the shares to be allotted, he will not be liable to be placed on the list of contributories, if no allotment has been made: *Re Zoological, etc., Society of Ontario* (1889) 16 A. R. 543; or where some other condition has not been fulfilled: *Re Standard Fire Ins. Co.* (1885) 7 O. R. 448; 12 A. R. 486; 12 S. C. R. 644.

As to the necessity for allotment, see the notes to s. 46 of the Companies Act and summary of cases, *infra*. See also the following unreported decision of the Allotment required.

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Master-in-Ordinary in Ontario: *Re Queen City Refining Co.*, 11th April, 1885. Consideration of cases bearing on the sufficiency of agreement to take shares to render subscribers liable as contributories, where contract conditional.

With regard to liability to the extent of the amount unpaid in respect of the contributory's shares, the same questions arise as are discussed in the notes to s. 38 of the Companies Act, which see. See also cases noted below under 'Defences.'

Fully paid shareholder.

A fully paid shareholder may be placed on the list: *Re Colonial Assurance Co., Ltd.* (1916) 29 D. L. R. 488; *Re Monarch Bank of Canada* (1914) 32 O. L. R. 207.

After the issue of the winding-up order a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company which can only be taken upon direct proceedings by the Attorney-General: *Common* v. *McArthur* (1899) 29 S. C. R. 239.

For liability of promoter before incorporation: see *Sandusky Coal Co.* v. *Walker* (1896) 27 O. R. 677.

Defences.

The grounds on which contributories have sought to evade liability may be classified under the following heads:—

Withdrawal of application.

1. Withdrawal of application before notice of allotment or notice never received.

(a) And have been held not liable in the following cases:—*Re London Speaker, etc., Co., Pearce's Case, supra; Re Zoological Society of Ontario, supra; Re Rosedale* (1889) 19 C. L. T. 311; *Magog* v. *Price & Magog* v. *Dobell* (1887) 14 S. C. R. 644; *Stevens* v. *London Steel Works, Delano's Case* (1888) 15 O. R. 75; *Hebb's Case* (1868) L. R. 4 Eq. 9; *Ritso's Case* (1877) 4 Ch. D. 774; *Natal Investment Co.* (1869) 20 L. T. 962 (withdrawal oral); *Truman's Case* [1894] 3 Ch. 272; *Northern Electric Co., Re* (1890) 63 L. T. 369; *Pellatt's Case* (1867) L. R. 2 Ch. 527; *Gunn's Case* (1868) L. R. 3 Ch. 40; *Land Shipping Co., Re* (1868) 18 L. T. 786; *Hutchinson's Case* [1895] 1 Ch. 226; *Ramsgate Hotel Co.* v. *Montefiore* (1866) L. R. 1 Ex. 109; *Baily's Case*

(1868) L. R. 3 Ch. 592; *Provincial Grocers* (*Calderwood's Case*) (1905) 10 O. L. R. 705; *Nasmith* v. *Manning* (1886) 5 A. R. 126; 5 S. C. R. 417, was not a case of a contributory, but the defendants were held not to be shareholders as no notice of allotment was proved. Sect. 61.

(b) But have been held liable where contributory has voted or received a dividend or executed a transfer or otherwise acted as a member or subscribed before incorporation and been named as a shareholder in Letters Patent, etc., and would now be held liable in the case of a company incorporated under the Ontario Act when they have signed the stock book before incorporation: *Re Haggart Bros. Mnfg. Co.* (1892) 19 A. R. 582; *Re Collingwood, etc., Co., Weddell's Case* (1890) 20 O. R. 107; *Re Bishop Engraving Co., Ex p. Howard* (1887) 4 M. R. 429; *Lake Superior Navigation Co.* v. *Morrison* (1872) 22 C. P. 217; *Kelly's Case* (1884) 7 O. R. 204; 12 A. R. 486; *Brown's Case* (1873) L. R. 9 Ch. 102; *Ex p. Lord Inchiquin* [1891] 3 Ch. 28; *Re Bread, etc., Association* (1893) 68 L. T. 434. See *Hutchinson's Case* [1895] 1 Ch. 226, *supra; Isaac's Case* [1892] 2 Ch. 158; *Re Hercynia Copper Co.* [1894] 2 Ch. 403.

As to what is sufficient registration: *Arnot's Case* (1887) 36 Ch. D. 702; *Ex p. Cammel* [1894] 2 Ch. 392.

And see also the following cases:—*Adams' Case* (1872) L. R. 13 Eq. 474; *Addinell's Case* (1865) L. R. 1 Eq. 225; *Re Queen City, etc., Co.* (1886) 10 O. R. 264 (but see *London Speaker, etc., Co., supra*); *Ward's Case* (1870), L. R. 10 Eq. 659; *Langer's Case* (1868) 37 L. J. Ch. 292; *Levita's Case* (1870) L. R. 5 Ch. 489; *Bloxam's Case* (1864) 33 Beav. 529; *Ex p. Boyle* (1885) 33 W. R. 450; *Walker's Case* (1868) L. R. 6 Eq. 30; *Montagu's Case* (1888), W. N. 137; *Hastie's Case* (1869) L. R. 4 Ch. 274; *Challis' Case* (1870) L. R. 6 Ch. 266; *Crawley's Case* (1869) L. R. 4 Ch. 322; *Hindley's Case* [1896] 2 Ch. 121; *Alabaster's Case* (1869) 7 Eq. 273; *Re Railway Time Tables Co.* (1889) 42 Ch. D. 104; *Kent* v. *Freehold Land Co.* (1868) L. R. 3 Ch. 493; *Whitehouse's Case* (1867) L. R. 3 Eq. 790; *Re General Ry. Syndicate* [1899] 1 Ch. 770; [1900] 1 Ch. 365, not

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liable; *Scholey* v. *Central Ry. Co.* (1870) L. R. 9 Eq. 266; *Taite's Case* (1867) L. R. 3 Eq. 795; *Challis' Case* (1871) L. R. 6 Ch. 266; *Haré's Case* (1869) L. R. 4 Ch. 503; *Oakes* v. *Turquand, supra; Re Scottish Petroleum Co.* (1883) 23 Ch. D. 413; *Ex p. Storey* (1890) 62 L. T. 791; *Baine's Case* (1888) 16 O.R. 293; 16 A. R. 237; and *Nasmith's Case* (1891) 18 A. R. 209.

Where notice of allotment posted before notice of withdrawal given: *Household Fire, etc., Co.,* v. *Grant* (1879) 4 Ex. D. 216. *Yelland's Case* (1852) 5 De G. & S. 395.

Care should be taken in applying the English cases, as many of them were decided on the construction of the Articles of Association. The general principle, however, laid down in *Re Bishop Engraving Co.* (1889) 4 M. R. 429, is recognized in the above cases.

Where rights of creditors have intervened: *Re Miller's Dale, etc., Co.* (1886) 31 Ch. D. 211; *Tennent* v. *City of Glasgow Bank* (1879) 4 App. Cas. 615.

Winding-up had commenced: *Re Thunder Hill Mining Co.* (1895) 4 B. C. R. 62. See *Re General Ry. Syndicate* [1900] 1 Ch. 365. See notes to s. 46 of the Companies Act.

Irregularity of allotment.

2. On the ground that there has been illegality, irregularity or want of formality in the allotment or otherwise.

(a) Have been held not liable: *Stevens* v. *London Steel Works, Delano's Case* (1887) 15 O.R. 75; *Stace* v. *Worth's Case* (1869) L. R. 4 Ch. 682; *Re Owen Sound Dry Dock* (1891) 21 O. R. 349; *Howard's Case* (1866) L. R. 1 Ch. 561; *Re Ontario Express Co.* (1894) 21 A. R. 646, 24 S. C. R. 716; *Harris's Case* (1872) L. R. 7 Ch. 587; *Re London & Southern, etc., Co.,* (1885) 31 Ch. D. 223; *Re British Empire Co.* (1888) 59 L. T. 291; *Re Portuguese Mines* (1889) 42 Ch. D. 160; *Heritage's Case* (1870) L. R. 9 Eq. 5; *Cartmell's Case* (1874) L. R. 9 Ch. 691; *Bunn's Case* (1860) 2 D. F. & J. 275; *Pellatt's Case* (1867) L. R. 2 Ch. 527; *Sewell's Case* (1868) L. R. 3 Ch. 138; *Re Bolt Co. Hovenden's Case* (1884) 10 P. R. 434; and see *Coté* v. *Stadacona Ins. Co.* (1881) 6 S. C. R. 193.

(b) But have been held liable: *Campbell's Case* (1874) L. R. 9 Ch. 1, 43 L. J. Ch. 1; *Re Cole, etc., Ins. Co. Close's Case* (1885) 8 O. R. 92; *Portuguese Copper Co.* (1890) 45 Ch. D. 16; *Staffordshire Gas Co.* (1892) 66 L. T. 413; *Straffon's Executors* (1852) 1 DeG. M. & G. 576, and 4 DeG. M. & Sm. 256; *In re Barned's Co.* (1887) L. R. 3 Ch. 105; *Crawley's Case, ubi supra; Oakes* v. *Turquand, ubi supra; Railway Time Tables Case* (1889) 42 Ch. D. 104; *Re Miller's Dale Co.* (1886) 31 Ch. D. 211; *Fothergill's Case* (1873), L. R. 8 Ch. 270; *Dent's Case* (1873) L.R. 8 Ch. 768; *Ooregum Co.* v. *Roper*, [1892] A.C. 125; *Ex p. Welton*, [1895] 1 Ch. 255; *Welton* v. *Saffery* (1897) W. N. 42; *Eddystone Co.*, [1893] 3 Ch. 9; *Chapman's Case*, [1895] 1 Ch. 771; *Ames' Case* (1896) W. N. 79; *Dalton* v. *Dalton* (1892), 66 L. T. 704. Sect. 51.

As to illegality in allotment, see *Stephenson* v. *Vokes* (1896) 27 O. R. 691; and see *National* v. *Egleson* (1881) 29 Gr. 406; *Re Central Bank, Baines' Case* (1889) 16 A. R. 257.

3. On the ground that some conditions of the application not complied with or some new condition imposed. Conditions not complied with.

(a) Held not liable: *Re Standard Fire Ins. Co., Turner's Case* (1885) 7 O. R. 448; *Ex p. Roberts* (1852) 1 Drew 204; *Re Barber* (1851) 15 Jur. 51; *Re Standard Fire, Barber's Case* (1885-6) 12 A. R. 486; *Addinell's Case* (1866), L. R. 1 Eq. 225; *Beck's Case* (1874) L. R. 9 Ch. 392; *Howard's Case* (1866), L. R. 7 Ch. 561; *Shackleford's Case* (1866) 1 Ch. 567; *Pellatt's Case* (1867) L. R. 2 Ch. 527; *Pentelow's Case* (1869) L. R. 4 Ch. 178; *Bunn's Case, ubi supra; Macdonald, Sons & Co.*, [1894] 1 Ch. 89; *Re Rosedale, supra;* and see *Caston's Case* (1884) 10 P. R. 339; *Re Northern Assurance Co. (Black's Case)* (1915) 25 D. L. R. 703; 25 Man. R. 670.

(b) Held liable: *Re Standard Fire Ins. Co., Caston's Case* (1885) 7 O. R. 448, 12 A. R. 486, 12 S. C. R. 644; *Elkington's Case* (1867) L. R. 2 Ch. 511; *Bridger's Case* (1870) L. R. 5 Ch. 305; *Rankin* v. *Hop & Malt Exchange* (1869) 20 L. T. 207; *Jackson & Shaw's*

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Case (1867) W. N. 226; *Crawley's Case, ubi supra; French* v. *Hamilton, etc., Copp's Case* (1866) 10 O. R. 497.

Fraud.

4. Application induced by fraud or misrepresentation.

(a) Held not liable: *Nelles* v. *Ontario Investment Assn.* (1888) 17 O. R. 129; *Oakes* v. *Turquand, ubi supra; Karberg's Case* [1892] 3 Ch. 1; *Canadian Direct Meat Co.* (1892) W. N. 146; *Scottish Petroleum Case, supra; In re General Ry. Syndicate, Whiteley's Case* [1900] 1 Ch. 365.

(b) Held liable: *Sharpley* v. *South Ry. Co.* (1876) 2 Ch. D. 663; *Scholey* v. *Central Ry.* (1870) L. R. 9 Eq. 266 (*n*); *Kent* v. *Freehold* (1867), L. R. 4 Eq. 588; *Aarons Reefs* v. *Twiss* [1896] A. C. 273; *Whitehouse's Case* (1867) L. R. 3 Eq. 790; *Ex p. Briggs* (1866) L. R. 1 Eq. 483, 35 Beav. 273; *Nicol's Case* (1858) 3 DeG. & J. 387; *Ex p. Blackstone* (1867) 16 L. T. 273.

Application by agent.

5. Application made by agent who had authority.

(a) Held not liable: *Ormerod's Case* [1894] 2 Ch. 474; *Re Consort Deep Level* [1897] 1 Ch. 575.

(b) Held liable: *Carmichael's Case* [1896] 2 Ch. 643; *Halifax Sugar Co.* (1891) W. N. 29; *Chisholm's Case* (1885) 7 O. R. 448; 63 Vict. (N.B.) c. 34, s. 3, amending s. 38 of the Act of 1893.

The reader is also referred to the notes and cases cited under s. 46 of the Companies Act, see *supra.*

No longer a shareholder.

6. That person sought to be made a contributory has ceased to be a shareholder.

A person may cease to be a shareholder for the purpose of this defence by transfer, forfeiture or surrender of his shares.

As to the circumstances under which a transfer of shares will terminate the liability of the transferor, see the notes to s. 64 of the Dominion Companies Act. See also s. 52 of the Winding-up Act for liability after transfer of shares. For forfeiture see the notes of s. 62 of the Dominion Companies Act.

The liquidator is not entitled to take advantage of any irregularities in the proceedings prior to forfeiture for the purpose of placing the former shareholder

on the list of contributories: *In re D. Wade Co* (1908-09) 2 Alta. L. R. 117. In the absence of statutory authority a surrender of shares is no defence, unless the company was entitled to declare the shares forfeited and the surrender was merely a short cut to that end: *Smith* v. *Gowganda* (1909-11) 44 S. C. R. 621; *Re Winnipeg Hedge Wire Fence Co.* (1912) 1 D. L. R. 316. See, however, *Re Colonial Assurance Co., Crossley's Case* (1917) 34 D. L. R. 341, where a transfer to a trustee for the company in settlement of pending litigation was held to exonerate the shareholder. See also the following unreported decision of the Master-in-Ordinary: *Re Canadian Relief Society, J. J. Paterson's Case.* Judgment of M. O. confirmed on appeal. Suspended beneficiary held to be contributory as to assessments levied after his suspension but before he had severed his connection with the society and up to the time registry was revoked.

Shares held as collateral security.

7. Shares held as collateral security only.

The Companies Acts of the different provinces and the Dominion Act provide, subject to certain conditions, that persons holding shares as collateral security only shall not be personally liable thereon. See the notes to s. 41 of the Dominion Companies Act.

Company without power to hold shares.

8. In the case of a company sought to be made a contributory that the company has no power to hold the shares.

Thus in *Re Central Bank, North America Life Insurance Company's Case* (1890) 30 C. L. T. 275, the company escaped double liability in respect of bank shares.

Under the modern forms of memorandum of association (and *a fortiori* in the case of letters patent in the same form) containing broad objects clauses of the kind criticised in *Cotman* v. *Brougham* (1918) A. C. 514; 87 L. J. Ch. 379, it will be generally found that the company is entitled to hold the shares in question and this defence will not succeed.

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9. That no shares of the class subscribed for, *e.g.*, preference shares, were properly allotted and issued: see *Re Bankers Trust & Barnsley* (1915) 21 D. L. R. 623; 21 B. C. R. 130.

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10. That the shares allotted are not the shares subscribed for, *e.g.*, where the application is for treasury shares and the company causes shares already issued to promoters to be issued to the applicant: *Western Union Fire Ins. Co.* v. *Alexander Loggin* (1918) 39 D. L. R. 632.

11. That the shares are fully paid.

This defence is frequently raised when shares have been issued as paid up for services rendered or as consideration for assets transferred to the company. See the notes to s. 38 of the Companies Act.

Paying up shares.

The prohibition to be found in the companies Acts of the various provinces against issuing shares for a consideration other than cash unless a written contract has been entered into and filed with the Registrar of Joint Stock Companies, was taken originally from s. 25 of the Imperial Companies Act of 1867, which is as follows:—

Statutory requirements.

'Every share in any company shall be deemed and be taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares.'

The same or a similar section appears in the Companies Acts of Prince Edward Island, New Brunswick, Nova Scotia and Alberta. The corresponding provision of the Dominion Companies Act, R. S. C. (1886) c. 129, s. 27, has been dropped.

In the case of companies incorporated under the Dominion Act or under the Acts of those provinces whose company statutes do not contain a similar provision, a valid contract will still be necessary, though it need not be in writing and is not required to be filed. However, the same object is achieved in some provinces, e.g., Ontario, by imposing a penalty on directors of a company (which is subject to Part VIII) unless a contract governing the issue of the shares is filed, thus indirectly imposing the requirement of a written contract. The Imperial Act was amended by 61 & 62 Vict.

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c. 26, which provided relief in cases of omission through inadvertence to file the contract, and this or similar legislation has been adopted in the provinces of New Brunswick, Nova Scotia and Alberta.

The following are some of the decisions under the above section and corresponding Imperial and Provincial sections.

The conditions required to constitute a valid contract under the above section are—

(1) The existence of a contract;

(2) That the contract be duly made in writing;

(3) That the contract be filed with the Registrar of Companies. And these three things must be done at or before the date of the issue of the shares: *New Eberhardt Co.* (1889) 43 Ch. D. 118; and see *In re Kharaskhoma Exploring Syndicate* [1897] 2 Ch. 451.

The contract must shew the consideration: *In re Maynards Limited* [1898] 1 Ch. 515; *In re Frost & Co.* [1899] 2 Ch. 207; *In re African Gold Concessions and Development Co.* [1899] 2 Ch. 480; *In re Jackson* [1899] 1 Ch. 348; *In re Watson & Co.*, [1899] 2 Ch. 509. *In re British Columbia Electric Railway* (1899) W. N. 260; *Spiers & Bevan's Case* [1899] 1 Ch. 210; *Fisher's Case* (1899), W. N. 35; *Crickmer's Case* (1875), L. R. 10 Ch. 614.

Adequacy of consideration.

If there is a valid contract the Court will not go into the question of the adequacy of the consideration: *In re Wragg* [1897] 1 Ch. 796; *Pell's Case* (1869) L. R. 5 Ch. 11; *In Re Baglan Hall Co.* (1869) L. R. 5 Ch. 346. But if the consideration is illusory or treated as not equal to par value the allottee will not be relieved from paying the balance: *In re Theatrical Trust* [1895] 1 Ch. 771; *In re Almado & Tirito Co.* (1888) 38 Ch. D. 415; *Union Bank* v. *Morris* (1900) 27 A. R. 396. But the failure of consideration will not render the holders liable to calls: *Mege & Angier's Case* (1875) W. N. 208; *Ex p. Tanner's Case* (1852) 21 L. J. Ch. 584.

Shares cannot be issued at a discount, even if the contract is filed: *In re Addlestone Co.* (1888) 37 Ch. D. 191; *In re Almado and Tirito Co.* (1888) 38 Ch. D. 415; *Ooregum Co.* v. *Roper* [1892] A. C. 125.

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It is not necessary that the contract should state the denoting number of the shares; *In re Delta Syndicate* (1885) 30 Ch. D. 153; *Buenos Ayres Co.* (1875) W. N. 59. But it would seem that it should state the number of shares to be issued: *Transvaal Exploring Co.* v. *Albion* [1899] 2 Ch. 370; *In re Common Petroleum Engine Co.* [1895] 2 Ch. 759.

Parties to contract.

A contract made with a trustee or agent for the company before incorporation may be sufficient: *Hartley's Case* (1874) L. R. 10 Ch. 157. But a mere "resolution" by certain persons interested in a mining property setting forth the manner in which they proposed to put property before the public is not a sufficient contract even though put in the form of a contract: *Smith* v. *Brown* [1896] A. C. 614, p. 623.

Requirements as to contract.

The section does not apply where shares were never allotted: *Norton's Case* (1881) 50 L. J. Ch. 454.

The section is not satisfied by registration of articles of association providing for the execution of a contract: *Pritchard's Case* (1873) L. R. 8 Ch. 956; *Crickmer's Case* (1875) L. R. 10 Ch. 614; *Founstone's Case* (1875) L. R. 20 Eq. 524; *Dalton* v. *Dalton* (1892) 66 L. T. 704.

The contract is not to be a mere agreement between the shareholders to take up shares without consideration: *ibid.* But see *Anderson's Case* (1877) 7 Ch. D. 75, where, however, the contract was registered. And see *Fothergill's Case* (1873) L. R. 8 Ch. 270.

Allotment to nominees.

Where the contract provides that the shares may be issued to A or his nominees and such shares are issued to the nominees they will be protected: *Carling's Case* (1875) 1 Ch. D. 124; *Kirby's Case* (1882) 46 L. T. 682; *In re Common Petroleum Engine Co.* [1895] 2 Ch. 759.

Filing contract.

The contract must be filed "at or before the issue of such shares." The issuing of the share certificates is not necessarily to be taken as the time of the issue of the shares: *Ex p. James* (1880) 5 L. R. Ir. 139; *Blyth's Case* (1876) 4 Ch. D. 140. And see *Bush's Case* (1874) L. R. 9 Ch. 554; *Pool's Case* (1887) 35 Ch. D. 579; *In re Anglo-Colonial Syndicate* (1892) 65 L.T. 847; *Clarke's Case* (1878) 8 Ch. D. 635.

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The Court (apart from the amending legislation above referred to) has no jurisdiction to order a contract to be filed *nunc pro tunc*, but may in certain cases rectify the register: *In re Harwich Harbour Docks* (1876) 45 L. J. Ch. 56; *Re New Zealand Kapanga Co.* (1874) L. R. 18 Eq. 17 (n); *Re Denton Colliery Co.* (1874) 18 Eq. 16; *Re Darlington Forge Co.* (1887) 34 Ch. D. 522; *Broad Street Co.* (1887) W. N. 149; *In re Nottingham Brewery Co.* (1888) 4 T. L. R. 429; *Rushworth's Case* (1892) 66 L. T. 48; *Re Preservation Syndicate* [1895] 2 Ch. 768.

And it has even been held that the directors may rectify without going to Court: *Hartley's Case* (1874) L. R. 10 Ch. 157. But this can be done only in very exceptional cases: *Trevor* v. *Whitworth* (1887) 12 App. Cas. 409; *Bath's Case* (1878) 8 Ch. D. 334; *Wright's Case* (1871) L. R. 7 Ch. 55.

As to filing a memorandum of contract or sub-contract: see *In re Kharaskhoma Exploration Syndicate* (1897) 2 Ch. 451; *Ex p. James* (1880) 5 L. R. Ir. 139, and Imperial Act 61 & 62 Vict. c. 26, and amending legislation based thereon passed in the various provinces.

In case of default in filing the liability is to pay in cash: *Burkinshaw* v. *Nicholls* (1878) 3 App. Cas. 1016.

Payment in cash.

The Imperial Companies Act, 1867, s. 25, did not alter the law with regard to the question of what is a good payment for shares: *In re Limehouse Co., Coates' Case* (1874) L. R. 17 Eq. 169. The shareholder must shew that he has paid in cash unless he can shew that the provisions of the section have been otherwise complied with: *Cleland's Case* (1872) L. R. 14 Eq. 387. The cancellation of a debt due from the company for services is not payment in cash within the meaning of the section: *ib.* But payment in cash may be effected without any coin passing. It is sufficient if there is a debt presently and unconditionally due on either side and the parties agree to set it off, and the transaction is completed in the books: *Spargo's Case* (1873) L. R. 8 Ch. 407; *White's Case* (1879) 12 Ch. D. 511; *Bentley's Case*, 12 Ch. D. 851; *Barrow-in-Furness Co.* (1870) 14 Ch. D. 400; *Ferrao's Case* (1874) L. R. 9 Ch. 355; *Re*

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Jones, Lloyd & Co. (1889) 41 Ch. D. 159, and see *Re Ottawa Cement Block Co., Macoun's Case* (1907) 14 O. L. R. 389; but see *Kent's Case* (1888) 39 Ch. D. 259, where the transaction was not completed in the books, and *Johannesburg Co.* [1891] 1 Ch. 110 and *Ooregum* v. *Roper* [1892] A. C. 125, in which Lord Halsbury, L.C., disapproved of the above cases; also see *Union Bank* v. *Morris, Union Bank* v. *Code* (1900) 27 A. R. 396; *North Sidney Investment Co.* v. *Higgins* [1899] A. C. 263. Where a company agrees to issue paid up shares in consideration of property sold or services rendered it is impossible to treat the transaction as a cash payment, for the company never owed and never intended to owe any cash: *Andress's Case* (1878) 8 Ch. D. 126; *Pagin & Gill's Case* (1877) 6 Ch. D. 681. And the fact that the transaction is entered in the books as a cash payment does not affect the matter: *Andress's Case, ubi supra; White's Case,* 12 Ch. D. 511; *Newport Co.* (1880) 42 L. T. 785; (1880) W. N. 80.

And where the sale is for cash with merely an option to satisfy in shares, if the option is exercised the shares cannot be regarded as paid in cash. *Barrow's Case* (1880) 14 Ch. D. 432, and see *Larocque* v. *Beauchemin* [1897] A. C. 358. So too a surrender of a debenture not due cannot be treated as a payment in cash: *Ex p. Appleyard* (1871) 18 Ch. D. 587. In order that a transaction may be treated as a payment in cash there must be *bona fides.*

Meaning of "issue."

The "issue" is something different from the allotment or the issue of the certificates. A share is issued when the holder has acquired an absolute right thereto: *Bush's Case* (1874) L. R. 9 Ch. 554; *Blyth's Case* (1876) 4 Ch. D. 140. Allotment followed by entry on the register is certainly issuing: *Clarke's Case* (1878) 8 Ch. D. 642.

Earlier cases.

The following English cases were decided on the basis of this law before the Companies Act of 1867, s. 25, was passed, and they will accordingly be found applicable to those companies incorporated under the Dominion Act and under the Provincial Acts which do

not contain the above section. The Canadian cases are cases of companies coming under these Provincial Acts. Sect. 51.

In *Drummond's Case, Re China Steamship Co.* (1869) L. R. 4 Ch. 772, it was held that it was sufficient to pay in money's worth. In *Schroder's Case* (1871) L. R. 11 Eq. 131, bonds were held to be "money's worth." Shares may be allotted in payment of a debt and the shareholders so taking them will be estopped: *Re Matlock Old Bath Hydropathic Co.* (1873) 29 L. T. 441. A share payment will not constitute a valid payment: *In re Disderi & Co.* (1870) 40 L. J. Ch. 248; *Union Bank* v. *Morris* (1900) 27 A. R. 396. The conveyance of land or other property is sufficient to constitute a valid payment: *In re Matlock, etc., Co., Maynard's Case* (1874) L. R. 9 Ch. 60; *In re Baglan Hall Colliery Co.* (1870) L. R. 5 Ch. 346; *Pell's Case* (1869) L. R. 5 Ch. 11; *Sloan's Case* (1894) 21 A. R. 66, 23 S. C. R. 644; *Leifchild's Case* (1865) 11 Jur. (N.S.) 941. When the agreement has been to pay cash payment by coupons, which are overdue and to which equities are attaching, is not a valid payment: *Ex p. Holden* (1869) L. R. 8 Eq. 444.

Rendering services may be a valid payment: *Currie's Case* (1862) 3 De G. J. & S. 367.

When a person purchases shares as fully paid up in good faith without notice that they have been issued at a discount he is not liable to an execution creditor of the company for the amount unpaid on them: *McCraken* v. *McIntyre* (1877) 1 S. C. R. 479. In *Page* v. *Austin* (1884) 10 S. C. R. 132, at p. 149, Strong, J., commenting on the above case of *McCraken* v. *McIntyre*, says:—"*McCraken* v. *McIntyre*, following many English authorities, merely decided that the holder of shares which had been originally issued by the company as paid up in full could not be made liable either to the company or to the creditors of the company as for a debt due in respect of the shares, regarding them as having been issued as unpaid shares." Innocent purchasers.

In some cases though creditors might have a right against a person taking shares issued at a discount the members of the company might by reason of their acquiescence or otherwise be estopped from setting up

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such liability: *Burkinshaw* v. *Nicholls* (1878) 3 App. Cas. 1004. See judgment of Sedgewick, J., in *North-West Electric Co.* v. *Walsh* (1898) 29 S. C. R. 33; *Bloomenthal* v. *Ford* [1897] A. C. 156. See also *Union Bank* v. *Morris* (1900) 27 A. R., at p. 409; *Bishop* v. *Balkis Co.* (1890) 25 Q. B. D., at p. 521; *Fraser River* v. *Gallagher* (1895) 5 B. C. R. 82; *Blyth's Case* (1877) 4 Ch. D. 140; *Rowland's Case* (1880) 42 L. T. 785; *In re London Celluloid Co.* (1888) 39 Ch. D. 190; *In re Hall & Co.* (1888) 37 Ch. D. 712; *Barrow's Case* (1880) 14 Ch. D. 445; *In re Vulcan Iron Works* (1885) W. N. 120; *Parbury's Case* (1895) W. N. 142.

But the allottee cannot generally rely on a certificate issued to himself as an estoppel: *Simm* v. *Anglo-American* (1879) 5 Q. B. D. 188. Unless he can shew he has acted on it: *Hart* v. *Frontino* (1870) L. R. 5 Ex. 111; *De Ruvigne's Case* (1877) 5 Ch. D. 306; *Anderson's Case* (1877) 7 Ch. D. 75. And see *Re Eddystone Marine* (1893) 9 T. L. R. 329.

Semble, that if the company is solvent and creditors are not misled they cannot enforce the liability as against persons to whom stock was issued at a discount: *Re Owen Sound Dry Dock* (1892) 21 O. R. 349.

Liability after transfer of shares.

52. If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the company or its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the company for the purposes of this Act, and shall be liable to contribute as aforesaid, to the extent of his liabilities to the company or its members or creditors, independently of this Act.

An asset.

2. The amount which he is so liable to contribute shall be deemed an asset and a debt as aforesaid. R.S., c. 129, s. 45.

The general rule is that where a person has transferred his shares and the transferee has been registered as the holder therof, the transferor is no longer to be regarded as a shareholder and cannot be made a contributory: *Re Winnipeg Hedge and Wire Fence Co.* (1912) 1 D. L. R. 316.

The Imperial Act and the Acts of some of the provinces based thereon provide that all persons who have transferred their shares within a year before the

winding-up are liable under certain circumstances to be placed on the list. Sect. 52.

When a transfer has been made for a particular purpose such as to enable the transferee to vote at a meeting and no re-transfer has been made, the transferee will be liable as a contributory: *Ontario Investment Assn.* v. *Leys* (1893) 23 O. R. 496; *Re Union Fire Ins. Co., McCord's Case* (1891) 21 O. R. 264, and *cf.* the following unreported decision of the Master-in-Ordinary in Ontario: *Re Union Fire Insurance Co., Cases of Chabot, et al.*, 27th June, 1891. A scheme was concocted by some of the directors to purchase from certain shareholders their shares and to apply the funds of the company for that purpose. Such of the shareholders as transferred their shares in ignorance of this scheme were held to be relieved of their responsibility, but such of them as had only executed a power of attorney to one Alexander to transfer their shares, in pursuance of which no actual transfer was made, were held liable as contributories.

The section will also cover cases where the transferee has not been registered as holder of the shares and the transferor still appears as the owner thereof, under which circumstances the governing Companies Act commonly provides that the transferor's liability remains: See s. 64 of the Dominion Act and notes thereon.

The above section includes only past members "who have transferred their shares under circumstances which do not by law free them from liability in respect thereof," as for example, when the transfer has been fraudulent or collusive to avoid liability. It also provides that if any shareholder "is by law liable to the company or its members or creditors beyond the amount unpaid on his shares he shall be deemed a member." This provision will cover such cases as were dealt with in *Hill's Case* (1874) L. R. 20 Eq. 585; *Peninsular Co.* v. *Fleming* (1871) 27 L. T. 93; *McKewan's Case* (1877) 6 Ch. D. 447.

In the case of a bank, those who have held shares at any time within one month (60 days under present Act) before the suspension are liable as contributories: *Re*

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Central Bank of Canada, Baines' Case (1889) 16 A. R. 237; *Re Ontario Bank, Massey & Lee's Case* (1913) 8 D. L. R. 243. And a person to whom such shares are transferred is also liable: *Re Central Bank, Henderson's Case* (1889) 17 O. R. 110. In the case of a building society which had made advances to members on the security of real estate, it was held that the mortgagee members were not liable to be placed on the list of contributories: *Re St. John Building Society* (1889) 28 N. B. R. 597.

For an instance of double liability under the terms of a particular statute, see *Re Provincial Building Society* (1891) 30 N. B. R. 628.

A director of a company owning partly paid-up shares therein transferred some of such shares to another director, the sums paid up on all the shares being attributed to the retained shares by informal agreement between these two directors and another. A new certificate was issued with respect to the retained shares, bearing an endorsement as to the agreed amount paid up thereon. It was held, that the liquidator of the company was right in placing the original owner of shares upon the list of contributories, and treating the retained shares as if only the original payments had been made thereon: *Re Federal Mortgage Corporation and Stewart, Re Winding-up Act* (1917) 2 W. W. R. 282.

Liability of contributory a debt.

53. The liability of any person to contribute to the assets of a company under this Act, in the event of the business of the same being wound up, shall create a debt accruing from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability. R. S., c. 129, s. 46.

This section is substantially the same as s. 75 of the Imperial Companies Act, 1862.

After a winding-up order the liability to contribute no longer depends on the original contract alone but is a statutory liability resulting from this section.

It was held under the Imperial Bankruptcy Acts that the liability to pay calls which had not been made at the date of the adjudication was not a debt payable

presently or at a future time and that accordingly such calls could not be proved against the bankrupt's estate: *South Staffordshire* v. *Burnside* (1850) 5 Ex. 129; *General Discount Co.* v. *Stokes* (1864) 17 C. B. N. S. 765. And the same principle applies whether the call is made by a continuing company or under the Winding-up Acts: *ib.* Sect. 53.

The Imperial section was intended to meet these decisions, and also to remove the difficulties arising from the conflict of the decisions: see *Parbury's Case* (1861) 3 D. F. & J. 80; *Ex p. Nicholas* (1852) 2 D. M. & G. 271; *Chapple's Case* (1852) 5 De G. & Sm. 400; *Greenshield's Case, ib.* 599.

It was also held under the Imperial section that the liability of a contributory to calls commenced when he became a member: *Ex p. Canwell* (1864) 4 D. J. & S. 539; but the question is not free from doubt, *cf. Maritime Bank* v. *Troop* (1887-8) 16 S. C. R. 456, 471.

After a winding-up order has been made a judgment creditor of the company cannot bring an action under s. 61, R. S. O. (1887) c. 157, against a contributory for payment of the amount unpaid on his share: *Shaver* v. *Cotton* (1896) 23 A. R. 426.

54. In the case of the bankruptcy or insolvency of any contributory, the estimated value of his liability to future calls, as well as calls already made, may be proved against his estate. R.S., c. 129, s. 46. Provable against his estate.

Cf. Imperial Act 1862, s. 75, under which it has been held that if the winding-up preceded the shareholder's bankruptcy all future calls might be proved against his estate: *Ex p. Pickering* (1869) L. R. 4 Ch. 58; *Mitchell's Case* (1870) L. R. 5 Ch. 400; *McEwen's Case* (1871) L. R. 6 Ch. 582; *Ex p. Marshall*, 7 Ch. 324; *Financial Corporation* v. *Lawrence* (1869) L. R. 4 C. P. 731; but that when he was adjudicated bankrupt before the winding-up calls made in the winding-up could not be proved at all. The Imperial Bankruptcy Act has now been changed so as to do away with the above distinctions.

55. The court may, at any time, after making a winding up order, require any contributory for the time being settled on the list of contributories as trustee, receiver, banker, agent Contributory may be ordered to hand over money and books.

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or officer of the company, to pay, deliver, convey, surrender or transfer forthwith, or within such time as the court directs, to or into the hands of the liquidator, any sum or balance, books, papers, estate or effects which are in his hands for the time being, and to which the company is *prima facie* entitled. R.S., c. 129, s. 47.

Cf. Imperial Act, 1862, s. 100.

Contributory may be ordered to hand over money and books.

These summary powers cannot be exercised against a person who is not a contributory, trustee, receiver, banker, agent or officer of the company: *Ex p. Hawkins* (1868) L. R. 3 Ch. 787; *Hollinsworth's Case* (1849) 3 De G. & Sm. 102; *Cox's Case,* 3 De G. & Sm. 180; *Re National Bank* (1870) L. R. 10 Eq. 298; *Re Northfield Iron & Steel Co.* (1866) W. N. 253; *Re Marlborough Club* (1868) L. R. 5 Eq. 365.

The following cases, decided under a related section, s. 165 of the Imperial Companies Act, 1862, shew that the Court will exercise these summary powers whenever it can do so without injustice: See *Pearson's Case* (1877) 5 Ch. D. 336; 4 Ch. D. 222; *McKay's Case* (1876) 2 Ch. D. 1; *Stringer's Case* (1869) L. R. 4 Ch. 475; *Rance's Case* (1870) L. R. 6 Ch. 104; *Cardiff Coal Co.* v. *Norton* (1866) L. R. 2 Eq. 558; 2 Ch. 405. In the earlier cases it was held that these powers ought to be exercised with the greatest hesitancy; but in the later cases the power has been exercised more freely.

In *Re British Imperial Corporation* (1877) 5 Ch. D. 749, leave was given under the corresponding Imperial section to serve a summons out of the jurisdiction. This section does not apply to persons residing out of the jurisdiction: *British Canadian* v. *Grant* (1887) 12 P. R. 301. See, however, s. 111 of this Act providing for service out of the jurisdiction.

Court may order payment by contributory.

56. The court may, at any time after making a winding-up order, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents, to the company, exclusive of any moneys which he or the estate of the person whom he represents is liable to contribute by virtue of any call made in pursuance of this Act. R.S., c. 129, s. 48.

See *Westmoreland* v. *Fielding* (1891) 3 Ch. 15.

When calls may be made on contributories.

57. The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves. R.S., s. 129, s. 49.

Consideration of possible failure to pay.

Proviso as to maturity of debt.

58. The court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same: Provided that no call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained. R.S., c. 129, s. 49.

Payment by contributory into bank.

Enforcement of order.

59. The court may order any contributory, purchaser or other person from whom money is due to the company, to pay the same into some chartered bank or post office savings bank, or other bank or Government savings bank, to the account of the court, instead of the liquidator.

2. Such order may be enforced in the same manner as if it had directed payment to the liquidator. R. S., c. 129, s. 50.

Compare Imperial Companies Act, 1862, ss. 102-103.

After the list of contributories has been settled it is the duty of the liquidator to levy calls upon the contributories so settled, pursuant to the provisions of s. 58, and for that purpose the liquidator should bring before the Master an affidavit setting forth the facts on which to found an order for the call.

The settling of the list of contributories is a condition precedent to the making of a call: *Re English Bank of the River Plate* (1892) 61 L. J. Ch. 205, 207. See also notes to s. 48.

As to the meaning of debts and liabilities: see *Re Contract Corporation* (1866) L. R. 2 Ch. 95; and *Re Barned's Banking Company* (1867), 36 L. J. Ch. 215.

In New Brunswick it has been held that an attachment of the person for non-payment of money ordered to be paid by a judge under section 59 should be granted by the judge who made the order: *Ex p. St. John Building Society; Haggart's Case* (1890) 30 N. B. R. 251.

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The discretion of the Master as to the *quantum* of a call will not be interfered with on appeal without strong grounds being shewn for so doing: *Re Contract Corporation, supra; Re Barned's Banking Co., supra.*

The rule laid down in *Re Cordova Union Gold Co.* [1891] 2 Ch. 580, cited Buckley, 8th ed., p. 332, namely, that "where instalments upon shares were in the going company payable at postponed dates, the liquidator may, nevertheless, make calls for immediate payment," does not apply to a winding-up under our Act by reason of the proviso in section 58 that "no call shall compel payment of a debt before maturity, etc.," which is not contained in the Imperial section.

The proviso as to the maturity of debt is now incorporated with s. 58, whereas previously it was a part of s. 49, which has now been split up into two sections, viz., 57 and 58.

In re Victoria and Montreal Fire (1904) Q. R. 26 S. C. 282, decided under former s. 49, it was held that the liquidator could not with or without the authorization of the Court make calls of such a nature as to make the obligations of the contributories more onerous than provided in the charter. But see *Re Wiarton Beet Root Sugar Co., Jarvis's Case* (1905) 5 O. W. R. 542.

As to suing for judgment on a call made in a winding up, see *Maritime Trust Co.* v. *Alcock* (1916) 22 B. C. R. 399.

Rights of contributories.

60. The court shall adjust the rights of the contributories among themselves. **R.S., c. 129, s. 51.**

The necessity for adjusting the rights of contributories among themselves may arise from the fact that some shareholders have paid more than others on their shares, *cf. Re Monarch Bank of Canada* (1913) 32 O. L. R. 207. In that winding up it was found that some subscribers had paid in full and others varying proportions on their shares, and the whole nominal share capital subscribed was not required for meeting creditors' claims. The liquidator accordingly made a call for the purpose of equalization on all subscribers who had paid less than one-half on their subscriptions. Another case where the above section is frequently

applied is where preference shareholders have a prior right to a return of capital in a winding-up, and a surplus of assets is realized, as to which see the notes to s. 93. Also where some shareholders have made payments on their shares in advance of calls (as may be done under some companies Acts, *e.g.* the Dominion Act, s. 61), such shareholders are entitled on a return of capital to repayment of the amount so paid plus interest before other holders of shares of equal rank get anything: *Re Exchange Drapery* (1888) 38 Ch. D. 171. Sect. 60.

Compare Imperial Companies Act, 1862, s. 109.

As to what rights will or will not be adjusted under this section see the following cases:—*Maxwell's Case* (1874) L. R. 20 Eq. 585; *McKewan's Case* (1877) 6 Ch. D. 447; *Addison's Case* (1875) L. R. 20 Eq. 620; *Re Alexandra Palace Co.* (1883) 23 Ch. D. 297; *Re Anglesea Colliery Co.* (1867) L. R. 2 Eq. 379, 1 Ch. 555; *Re National Savings Bank Association* (1866) L. R. 1 Ch. 547; *Re Provision Merchants' Co.* (1872) 26 L. T. 862; *Scinde Punjaub & Delhi Co.* (1871) L. R. 6 Ch. 53 (n); *Re Coed Madog Slate Co.* (1877) W. N. 190; *Re Eclipse Gold Mining Co.* (1874) L. R. 17 Eq. 490; *Re Bangor Slate Co.* (1875) L. R. 20 Eq. 59; *Re Doncaster Permanent Building Soc.* (1867) 4 Eq. 579; *Holyford Mining Co.* (1867) L. R. 3 Eq. 208; *Re Exchange Drapery Co.* (1888) 38 Ch. D. 171; *Re Wakefield Rolling Stock Co.* [1892] 3 Ch. 165; *Re Hodge's Distillery* (1877) L. R. 6 Ch. 51; *In re Anglo-Continental Co.* [1898] 1 Ch. 327; *In re Mutoscope, etc., Co.* [1899] 1 Ch. 896; *In re Driffield* [1898] 1 Ch. 451; *Brown* v. *Dale* (1878) 9 Ch. D. 78; *Strick* v. *Swansea Tin-plate Co.* (1887) 36 Ch. D. 558; *Birch* v. *Cropper* (1889) 14 App. Cas. 525. And see *Re Railway Time Tables Co.* [1895] 1 Ch. 255; *Re Weymouth Packet Co* [1891] 1 Ch. 66.

As to distribution of profits earned before and after liquidation: see *Bishop* v. *Smyrna* [1895] 2 Ch. 265, 596; and *In re Bridgewater* [1891] 2 Ch. 317.

Meetings of Creditors.

61. The court may, if it thinks expedient, direct meetings of the creditors, contributories, shareholders or members to be summoned, held and conducted in such manner as the court

Meetings of creditors for ascertaining their wishes

Secs. 61-66.

directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court. R. S., c. 129, s. 19.

Votes according to amount of claim.

62. In such case regard shall, as to creditors, be had to the amount of the debt due to each creditor and as to shareholders or members, to the number of votes conferred on each shareholder or member by law or by the regulations of the company.

Preliminary Proof.

2. The court may prescribe the mode of preliminary proof of creditors' claims for the purpose of the meeting. R. S., c. 129, s. 19.

Court may summon creditors to consider any proposed compromise.

63. Where any compromise or arrangement is proposed between a company in course of being wound up under this Act and the creditors of the company, or by and between any such creditors or any class or classes of such creditors and the company, the court, in addition to any other of its powers, may, on the application, in a summary way, of any creditor, or of the liquidator, order that a meeting of such creditors or class or classes of creditors shall be summoned in such manner as the court shall direct. 62-63 V., c. 43, s. 3.

Sanction of compromise.

64. If a majority in number, representing three-fourths in value, of such creditors, or class or classes of creditors, present either in person or by proxy at such meeting, agree to any arrangement or compromise, such arrangement or compromise may be sanctioned by an order of the court, and in such case shall be binding on all such creditors, or on such class or classes of creditors, as the case may be, and also on the liquidator and contributories of the company. 62-63 V., c. 43, s. 3.

Chairman of meeting.

65. In directing meetings of creditors, contributories, shareholders or members of the company to be held as provided in this Act, the court may either appoint a person to act as chairman of such meeting, or direct that a chairman be appointed by the persons entitled to be present at such meeting; and, in case the appointed chairman fails to attend the said meeting, the persons present at the meeting may elect a chairman qualified who shall perform the duties prescribed by this Act. 52 V., c. 32, s. 13.

Voting to be in person or by proxy.

66. No contributory, creditor, shareholder, or member shall vote at any meeting unless present personally or represented by some person acting under a written authority, filed with the chairman or liquidator, to act as such representative at the meeting, or generally. R. S., c. 129, s. 55.

Compare Imperial Companies Act, 1862, ss. 91 and 149.

The English rules prescribe certain formalities an requirements in holding the meeting and certifying its determinations which are not embodied in our practice. Secs. 61-66.

Creditors who do not attend after notice are presumed to be willing to be bound by the action of those who do attend: *Exchange Bank* v. *Campbell* (1885) 15 R. L. 373.

As to the action of the Court when there is a conflict as to appointment of liquidator, see *Re Central Bank* (1888) 15 O. R. 309; *Re Alpha Oil Co.* (1887) 12 P. R. 298; *Re Bank of Liverpool* (1889) 22 N. S. 97; *Re Commercial Bank* (1893) 9 M. R. 342; *Cloyes* v. *Darling* (1884) 16 R. L. 649.

As to submitting proposals with reference to matters arising in the winding-up: *Ex p. Slatter's Executors* (1851) 5 DeG. & Sm. 34.

If creditors pass resolutions which are not "*bonâ fide*" in the interests of the winding-up but are for some ulterior object the liquidator may get the leave of the Court to disregard the resolutions: *Ex p. Cocks, Re Poole* (1882) 21 Ch. D. 397. Compare *Ex p. Strawbridge* (1883) 25 Ch. D. 266. See also as to the powers of dissentient minorities: *Re Sun Lithographing Co.* (1893) 24 O. R. 200.

Prior to the passing of 62 & 63 Vict., c. 43, s. 3 (now ss. 63 and 64), the only power to compromise a debt due to the company was that given by s. 61 of R. S. C. c. 129 (now s. 37). The present section provides that the Court may on application of the liquidator or any creditor of the company in a summary way order that a meeting of creditors shall be called to consider any proposed compromise, and if a majority representing three quarters in value of such creditors agree to any arrangement or compromise such arrangement or compromise shall, if sanctioned, by an order of the Court, be binding on the creditors, the liquidators, and the contributories.

As to the law before the enactment of the above statute, see *Re Sun Lithographing Co.*, 24 O. R. 200, where it was held that a dissentient minority of creditors could not be forced to compromise.

Secs. 61-66.

Sections 63 and 64 are in supplement of s. 37, and do not modify it: *Ward* v. *Mullin* (1905) Q. R. 14 K. B. 49.

Production of Pass-books.

Bank book of liquidator to be produced at meeting.

67. At every meeting of the contributories, creditors, shareholders or members, the liquidator shall produce a bank pass-book, showing the amount of the deposits made for the company, the dates at which such deposits were made, the amount withdrawn and dates of such withdrawal. R. S., c. 129, s. 37.

And on order of court.

68. The liquidator shall also produce such pass-book whenever ordered so to do by the court. R. S., c. 129, s. 38.

Creditors' Claims.

What debts may be proved against company.

69. When the business of a company is being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, shall be admissible to proof against the company.

Uncertain claims valued.

2. In case of any claim subject to any contingency or for unliquidated damages or which for any other reason does not bear a certain value, the court shall determine the value of the same and the amount for which it shall rank. R. S., c. 129, s. 56.

Creditors' claims.

Compare Imperial Companies Act, 1862, s. 158; Bankruptcy Act, 1883, s. 35; Imperial Winding-up Rules, 1890, numbers 96-121; Insolvency Act (Dom.), 1875, s. 91.

The definition of a "creditor" contained in s. 2 (j) corresponds with the above section. See also s. 12 and notes under "Who may petition." It is the policy of the Act that all claims against the company are to be dealt with and disposed with in the winding-up proceedings; see s. 22 and notes thereon.

Unless there is a surplus of assets available after payment of the principal of the debts all interest ceases at the commencement of the winding-up: *Warrant Finance Co.*, 4 Ch. 643; *Re Collie*, 17 Ch. D. 334; *Hughes Claim*, 13 Eq. 623; *London, etc., Hotel Co.* [1892] 1 Ch. 639.

For rules in cases of distribution of bank assets where there is such surplus, see *Re Commercial Bank of Manitoba* (1896) 10 Manitoba L. R. 61. But a secured

creditor who realizes his security is entitled to apply the proceeds in or toward payment of principal, interest and costs: *London Windsor Co.* [1892] 1 Ch. 639. Sect. 69.

A depositor whose deposit had been partially withdrawn held bound to rank: *Re Commercial Bank of Manitoba* (1896) 10 Man. L. R. 61. Depositors.

But where the relationship between the creditor and insolvent company is not that of customer and banker, but principal and agent, moneys collected by the agent for the principal will be impressed with a trust, if traceable, in favor of the principal: *Re International Mercantile Agency* (1906) 7 O. W. R. 795.

See also *Re Kennedy,* 36 U. C. R. 471; *Munro* v. *Commercial B. Soc.,* 36 U. C. R. 464.

When a depositor had left a cheque with the president of a bank with instructions to draw the money out and invest it in a mortgage as soon as a suitable security could be found and the president the day before the suspension drew the money out and put it in an envelope addressed to the depositor, it was held that the depositor must rank only as an ordinary creditor: *Re Commercial Bank of Manitoba* (1896) 10 Man. 61.

There is nothing in this section which alters or interferes with the *lex loci contractus*: *In re Hart and Ontario Express and Transportation Co.* (1893) 22 O. R. 510.

Shareholders who had made a voluntary payment to the company's reserve fund were held not to be entitled to rank as creditors therefor: *Re Atlas Loan Co.* (1904) 7 O. L. R. 706.

The Crown is entitled to a priority in a winding-up over other creditors of equal degree, whether the claim is asserted in right of the Dominion or one of the provinces: *Reg.* v. *Bank of Nova Scotia* (1884) 11 S. C. R. 1; *Maritime Bank* v. *Receiver General* (1892) A. C. 437; *Commissioners of Taxation for N. S. W.* v. *Palmer* (1907) A.C. 179; *In re Sid. B. Smith Lumber Co., Ltd.* (1917) 3 W. W. R. 844, but not where the priority is contrary to any local law: *Exchange Bank of Canada* v. *The Queen* (1886) 11 App. Cas. 157. In the case of an assignment for the benefit of creditors under Priority of the Crown.

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the Ontario Act different principles are applicable: *Clarkson* v. *A. G. of Ontario* (1888) 15 O. R. 632, (1889) 16 A. R. 202, but see *Commissioners of Taxation for N.S.W.* v. *Palmer* (1907) A. C. 179, 185.

In *In re Sid. B. Smith Lumber Co., Ltd.* (1917) 3 W. W. R. 844, following *Commissioners of Taxation for N. S. W.* v. *Palmer* (1907), A. C. 179, the claim of the Crown in the right of the Province of British Columbia was held entitled to priority as regards moneys due to the Accident Fund of the British Columbia Workmen's Compensation Board, which is " simply an adjunct or administrative body exercising its powers and acting for the Provincial Government on behalf of the province." See also *White Star Hotel Co.* v. *Turgeon* (1915-6) 17 Que. P. R. 299. Where the board is really a separate body and the company is not in truth a debtor of the Government there is no priority: *Fox* v. *Newfoundland Government* (1898) A. C. 667.

The Crown's priority will not affect creditors holding a specific security: *Re Imperial Paper Mills, Diehl* v. *Carritt* (1915) 7 O. W. N. 630.

Present, future, certain or contingent.

When the company has undertaken to indemnify a person against certain contingent liabilities such person can prove in respect of the liability though he has paid nothing: *In re Panther Lead Co.* (1896) 1 Ch. 978; *Hardy* v. *Fothergill,* 13 App. Cases 351; *British Provident* v. *Anglo Australian Co.,* 10 L. T. 326; *National Funds Co.,* 3 Ch. 791.

Surety.

So in the case of a surety: *Ex p. Delmar,* 38 W. R. 752.

And a guarantor who has not paid anything under his guarantee has a right to prove in respect of his contingent liability: *In re Blackpool Motor Car Co.* (1901) 1 Ch. 77. In *Re Stratford Fuel* (1913) 28 O. L. R. 481, affirmed (1914-5) 50 S. C. R. 100, *sub nom. Brown* v. *Coughlin,* the position of guarantors on a bond limited in amount for the ultimate balance due by the company, which later became insolvent, to a bank was considered. The bond was in the common form permitting compounding with the company, the primary debtor, and taking and giving up securities without

releasing the guarantors. In pursuance of the terms of settlement of litigation between the bank and the liquidator in respect of this and other securities held by the bank, it was agreed *inter alia* that the bank was not to rank upon the estate; that the bond in question should be declared valid; that the bank reserved all its rights against all securities in its hands and against the guarantors. The claimants, the guarantors, sought to rank against the estate of the company in respect of the payments which they had made to the bank under the guarantee. The guarantors were held entitled to rank, for they had a right to prove which had not been taken away by the dealings between the bank and the primary debtor. It was further held that it is not double proof, but double ranking so as to compel the payment of two dividends for the same debt that is objectionable; that even if there could be no double proof, the estate was not wound up, and as the creditor had been paid in full, the sureties could prove for the amount of the debt paid by them. See also as to double ranking, *Ontario Bank* v. *Chaplin* (1889-92) 20 S. C. R. 152. Sect. 69.

The winding-up order will not prevent a contingent liability of the company from ripening into a debt: *In re Northern Counties of England Co., Macfarlane's Claim* (1880) 17 Ch. D. 337. In this case the holder of a fire policy issued by the company was held entitled to prove for the full amount of a loss accruing after the winding-up.

Secured creditors are specially dealt with under a group of sections, 76-82, *infra*. Secured creditors.

The landlord can, of course, prove for past rent, but will invariably desire to take advantage of the special rights and remedies reserved by law or by the terms of the lease. The right of distress is discussed in the notes to ss. 22, 23 and 84, which see; and the right to preferential payment in a winding-up under ss. 84 and 23. Rent.

As to landlord proving for future rent, if the landlord accepts a surrender of the lease he may prove for the loss occasioned by such surrender: *In re Panther Lead Co.* [1896] 1 Ch. 978; *Hardy* v. *Fothergill*, 13 A.C.

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351; *Craig's Claim* [1895] 1 Ch. 267. But this can only be done when the landlord accepts a surrender: *In re New Oriental Bank* [1895] 1 Ch. 753. As to proving for future rent when there is an acceleration clause in the lease, see *Shackell* v. *Charlton* [1895] 1 Ch. 378. Before the case of *Hardy* v. *Fothergill, supra,* it had been held, *In re Horsey's Claim,* L. R. 5 Eq. 561; *Hayter Granite Co.,* L. R. 1 Ch. 77, that a landlord could not prove in respect of damage sustained for loss of future rent, but in *Craig's Claim, supra,* and *In re Panther Lead Co., supra,* it was said that *Hardy* v. *Fothergill* introduced a new rule in respect of this class of claims.

See also ss. 23 and 84.

Taxes and Rates.

The right to prove for a claim for taxes depends on the right to maintain an action therefor, which only exists when the taxes can not be recovered in any special manner provided for by the Assessment Act, *e.g.,* distress or sale: *In re Ottawa Porcelain and Carbon Co.* (1900) 31 O. R. 679. The principle is there stated by Street, J., at p. 690, as follows: "Where there is no right of action, and therefore no priority between the person entitled to distrain and the company in liquidation, the person entitled to distrain may pursue his only remedy, viz., that of distress and reap the fruits of it as though there had been no liquidation. But where there is a right of action, even though there is a right of distress, then the creditor is within the Winding-up Act and must prove as an ordinary creditor." So it was held that there was right of proof for a water rate, where a corporate liability was imposed, *ibid.*

Taxes imposed before the winding-up can only rank as ordinary debts in the absence of a statutory lien or charge, but taxes imposed after the commencement of the winding-up must be paid in full as part of the expenses of liquidation if the liquidator has remained in possession, and such possession has been a "beneficial occupation": *Re Ideal House Furnishers and Winnipeg* (1909) 18 Man. R. 650. As to what constitutes such occupation by the liquidator as will create a liability to pay taxes, see *In re National Arms and*

Ammunition Co. (1885) 28 Ch. D. 474 and the cases there cited; see also the notes to s. 23. Sect. 69.

As to the right of a municipality to rank in respect of "business tax" see *Re Ideal House Furnishers* (1909) 18 Man R. 650.

The claim must be treated as an ordinary and not a preferential claim where the municipality being entitled to distrain before the winding-up order, has not done so: *Re Faulkners, Ltd., City of Ottawa's Claim* (1915) 34 O. L. R. 536.

The following unreported decision of the Master-in-Ordinary in Ontario may also be referred to.

Where parties in the position of trustees for a company have purchased claims against the company at a discount they may rank for the face value of the claims, but are entitled to receive dividends only to the extent of their actual payments made to acquire the claims: *Re Catholic Register, Ex p. Foy & Coffee,* Master-in-Ordinary (Ont.), 10 Feb., 1900. And see *Humber Iron Works Co.,* L. R. 8 Eq. 122; and *Re Larking,* 4 Ch. 566.

70. Clerks or other persons in, or having been in the employment of the company, in or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears which have accrued to them during the three months next previous to the date of such order. R. S., c. 129, s. 56. Claims of clerks and employees privileged.

The claims for arrears of salary and wages of the persons specified in the section enjoy a special privilege over other creditors, but as the Crown is not mentioned in s. 70 the claim of the Crown to priority is not affected. See s. 16 of the Interpretation Act.

Where the claim comes into conflict with other privileged claims, *e.g.,* of a lessor, the local law governs: *White Star Hotel* v. *Turgeon* (1915-16) 17 Que. P. R. 299.

Where a claim under the section comes into competition with a security held by a bank under s. 88 of the Bank Act, see *Re Alberta Ornamental Iron Co. & Imperial Bank* (1917) 35 W. L. R. 126.

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Priority of wage-earners.

As to priority of wage-earners and material men, see *Re Canadian Mineral Rubber Co.* (1916) 10 O. W. N. 456, (1916-7) 11 O. W. N. 135; and as to the effect of taking a promissory note for the amount of wages see *Armstrong* v. *Watson* (1919), 45 D. L. R. 501.

Clerks or other persons.

As to the meaning of " clerk " see *Morlock & Cline* (1911) 23 O. L. R. 165, 166. A managing director is not a clerk: *In re Newspaper Proprietary Syndicate* (1900) 2 Ch. 349; nor is a manager: *White Star Hotel* v. *Turgeon* (1915-16) 17 Que. P. R. 299. See also notes to s. 85 of the Companies Act.

There are numerous cases in which the courts have had to decide who will be included under the terms " other persons." It has been held that the *ejusdem generis* rule applies: *Re Ritchie-Hearn Co.* (1905) 6 O. W. R. 474; *Miquelon* v. *Vilandre* (1914) 16 D. L. R. 316; *Re Shirleys, Ltd.* (1916) 29 D. L. R. 273; but in *Morlock & Cline* (1911) 23 O. L. R. 165, while the rule did not exclude a commercial traveller it was said that it is more sparingly applied than formerly.

The person seeking the special privilege must not be in an independent position, *e.g.*, an auditor or a solicitor who might do work for many companies: *Re Ontario Forge & Bolt Co.* (1896) 27 O. R. 230. On this principle a managing director has been held disentitled to any special privilege. 'Other persons' must be 'of the servant and not of the executive or master class': *Re Ritchie-Hearn Co.* (1905) 6 O. W. R. 474. A director is not a servant but a manager: *Re Newspaper Proprietary Syndicate* (1900) 2 Ch. 349. The element of control by the company is important: *Re Western Coal Co., Ltd.* (1913) 12 D. L. R. 401; *Re Parkin Elevator Co., Ltd., Dunsmoor's Claim* (1916) 37 O. L. R. 277.

Salary or wages.

The words ' salary or wages ' import a contract for service as distinguished from a contract for services, and an independent contractor is not covered by the section, *ibid.*, per Masten, J. Where, however, a director is employed as a commercial traveller and takes no active part in the management of the company he has been held entitled to priority: *Morlock & Cline* (1911) 23 O. L. R. 165.

An assignee of the privileged creditor may make the claim: *Lee* v. *Friedman* (1909) 20 O. L. R. 49, *Morlock & Cline, supra.* Sect. 70.

Where a servant is remunerated by a fixed sum and expenses, the latter are to be reckoned as part of the wages for which a privilege may be claimed: *Re Morlock & Cline* (1911) 23 O. L. R. 165. A bonus in addition to salary may come within the privilege: *Allner* v. *Lighter* (1913) 13 D. L. R. 210. Where a person came within the class his claim was not disallowed because his remuneration was payable by way of commission: *Re Hartwick Fur Co., Ltd., Murphy's Claim* (1914) 17 D. L. R. 853. These cases have been criticized in the Ontario Court of Appeal in *Re Parkin Elevator Co., Dunsmoor's Claim* (1916) 37 O. L. R. 277, Meredith, C.J.C.P, observing, at p. 283, that they reach if they do not overstep the limits of the law. In the last mentioned case Meredith, C.J.C.P., held that it was contrary to any reasonable meaning that could be attributed to the words 'salary or wages' to include the proportion of the price of the goods which the claimant was to have for the sales made by him. The judgment of Masten, J., went on the ground that the claimant was not one of the classes of persons entitled to priority, holding that receipt of a commission in lieu of wages looks in the direction of an independent contractor but is not conclusive. Riddell and Lennox, JJ., concurred in the result but gave no reasons. Salary or wages.

The following have been held entitled to priority:— Examples.
A commercial traveller: *Morlock & Cline* (1911) 23 O. L. R. 165; *Re Hartwick Fur Co., Ltd., Murphy's Claim* (1914) 17 D. L. R. 853; *Allner* v. *Lighter* (1913) 13 D. L. R. 210.

A salesman on salary under s. 10 of c. 111 of N. W. T. Ordinances Alta. (1911), notwithstanding that he also acted as secretary; *semble* as secretary he would have been preferred: *Re S. E. Walker Co., Ltd.* (1913) 12 D. L. R. 769. Entitled to priority.

A teamster using his own waggon and team, who is not an independent contractor, but is subject to the direction and control of his employer: *Re Western*

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Coal Co., Ltd. (1913) 12 D. L. R. 401, a case decided under the above statute.

Priority of wage-earners.

The following have been held not entitled to priority:—

An accountant temporarily employed by the company to audit the company's books and who is not subject to any direction or control in so doing: *Miquelon* v. *Vilandre* (1914) 16 D. L. R. 316.

Not entitled to priority.

An auditor, who is remunerated by 'audit fee': *Re Ontario Forge & Bolt Co.* (1896) 27 O. R. 230.

A manager: *Re Shirleys, Ltd.* (1916) 29 D. L. R. 273; *Girard* v. *Gariepy* (1916) 49 Que. S. C. 284; *White Star Hotel* v. *Turgeon* (1915-16) 17 Que. P. R. 299.

A managing director: *Re Ritchie-Hearn Co.* (1905) 6 O. W. R. 474; and under s. 10 of c. 111 of N. W. T. Ordinances, Alta. (1911), where it was impossible to apportion his salary so as to allow a certain portion of compensation for his services as salesman: *Re S. E. Walker Co., Ltd.* (1913) 12 D. L. R. 769.

A mechanical expert and inspector: *Re American Tire Co.* (1903) 2 O. W. R. 29.

Law of set-off to apply.

71. The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act. R. S., c. 129, s. 57.

Compare Imperial Companies Act, 1862, s. 101; Insolvent Act (Dom.) 1875, s. 107. See also s. 100 of this Act.

The law of set-off applicable in each case will be the law in force in the province where the proceedings are taken, *e.g.*, in Ontario the provisions of the Judicature Act, R. S. O. 1914, c. 56, s. 126.

As to the nature of set-off, see *Thompson* v. *Big Cities* (1910) 21 O. L. R. 394, 402; *Grills* v. *Farah* (1910) 21 O. L. R. 457; and for the distinction between counterclaim and set-off: *Gates* v. *Seagram* (1909) 10 O. L. R. 216. The distinction may be of importance under this section: see *Crain* v. *Wade* (1917) 37 D. L. R. 412, 417.

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It is only 'mutual debts' which are properly the subject of set-off, as distinguished from counterclaim, which fall within s. 71.

In *Crain* v. *Wade* (1917) 37 D. L. R. 412, 55 S. C. R. 208 (affirming the judgment of the Ontario Court of Appeal (1916) 27 D. L. R. 179; (1915-6), 35 O. L. R. 402), it was held that a claim by the plaintiff on promissory notes or on an account could not be set off against a claim by the liquidator for the recovery of chattels and for damages for their wrongful seizure; nor was the plaintiff entitled to set off against the claim of the liquidator the amount of debentures of the company transferred to the plaintiff as vendor to the company as part of the purchase price of the chattels. See also *Eberle's Hotels and Restaurant Co.* v. *James* (1887) 18 Q. B. D. 49. It is a fundamental principle of the law of set-off that the right shall be mutual and a misfeasant can not set off money due to him from the company against sums due for misfeasance: *Ex parte Pelly* (1882) 21 Ch. D. 492. If, however, a claim originally for damages has by judgment become a debt it can be set off: *Moody* v. *Canadian Bank of Commerce* (1891) 14 P. R. 258.

The requirement that the debts must be mutual and between the same parties and in the same interest is also illustrated by *Ince Hall Rolling Mills Co.* v. *Douglas Forge* (1882) 8 Q. B. D. 179. The liquidator of a company in the course of being wound up sought to recover from the defendants the price of goods supplied to them by the company after, but in pursuance of a contract made before, the commencement of the winding-up, the contract not being a sale of specific goods. It was held that the defendants could not set off a debt from the company to them incurred while the company was carrying on business independently and for its own benefit.

As to the significance of the words 'debts due or accruing due to the company at the commencement of the winding-up': see *Crain* v. *Wade* (1917) 37 D. L. R. 412.

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A claim on a policy that has matured before the winding-up can be set off: *Sovereign Life* v. *Dodd* (1892) 2 Q. B. 573.

Where by set-off the debt on one side is satisfied the security for that debt is freed: *Re Barnett* (1874) 9 Ch. App. 293. And see *Clarke* v. *Union* (1884) 4 C. L. T. 249; *Kindsgrove Steel Co.* (1894) W. N. 25; *Washington Diamond Co.* (1893) 3 Ch. 95. See also *Re Canadian Home Investment Co.* (1917) 37 D. L. R. 598.

As to set-off against an assignee of a director against whom the liquidator has subsequently to the assignment recovered damages for misfeasance: see *In re Milan Tramways Co., Ex parte Theys* (1882) 22 Ch. D. 122, 125, 126; *Re Bailey Cobalt Mines, Ltd.* (1919) 44 O. L. R. 1, where the cases are collected.

Even where there is no set-off the rule that 'where an estate is being administered by the court, or where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund' will prevent a director against whom the liquidator has recovered damages for misfeasance from obtaining payment of his claim against the company without paying in what he has been found liable to contribute: *In re Rhodesia Goldfields, Ltd.* (1910) 1 Ch. 239; *Re Bailey Cobalt Mines, Ltd.* (1919) 44 O. L. R. 1.

Shareholders.

A shareholder who is also a creditor has no right to set-off a debt due by him to the company against his liability as a contributory: *Re Wiarton Beet Root Sugar Co., Alexander McNeill's Case* (1905) 10 O. L. R. 219; or against the double liability imposed on shareholders under the Bank Act: *Maritime Bank* v. *Troop* (1890) 16 S. C. R. 456. The reason in both cases is the absence of mutuality between the claims of the liquidator against the contributory and the claim of the latter as creditor of the company as a going concern. Moreover, as observed by Teetzel, J., in *Wiarton Beet Root Sugar Co., supra,* at p. 223, 'To allow a set-off by a shareholder who is also a creditor would violate the spirit and intention of the Winding-up Act, the ruling

object of which is the distribution of the assets of an insolvent company amongst its creditors *pari passu.'* Sect. 71.

See also *Grissell's Case* (1865-6) 1 Ch. 528; *Calisher's Case* (1867-8) 5 Eq. 214; *Barnett's Case* (1874-5) 19 Eq. 449; *Black's Case* (1872-3) 8 Ch. 254; *Re Consolidated Investments, Ltd., Simons' Case* (1918) 2 W. W. R. 581.

The same rule applies to a claim for goods supplied to the company under agreement: *Re Jones & Moore Electric Co.* (1908-9) 18 Man. R. 549. *In re Mimico, Pearson's Case* (1895) 26 O. R. 289, is not a useful decision on the question of set-off: *Re Wiarton Beet Root Sugar Co., supra,* at p. 224.

A creditor who is also a shareholder may set off his debt against calls made on his shares before the winding-up: *Re Ontario Fire Insurance Co., Heighington's Case,* 10 W. W. R. 911.

If the debt is incurred by the liquidator in the winding-up it may be set off: *Ex p. Clark* (1868-9) 7 Eq. 550, and see *In re Pyle Works* (1890) 44 Ch. D. 534, where the shareholder creditors had a charge on the calls.

The question as to whether, in the case of a provincially incorporated company being wound up under the Dominion Act, the provincial legislature may confer a right of set-off on a shareholder which can not be curtailed by Dominion legislation, was raised but not decided in *Re Wiarton Beet Root Sugar Co., supra.*

See *Re Central Bank, Yorke's Case* (1888), 15 O. R. 625. (1) Consideration of term contributory. It does not include a mere stranger who is a debtor to the company, but contemplates one liable to contribute in the character of a partner or member.

(2) Can petitioner, an ordinary debtor, as against the note made by him held by the liquidator, set off deposit receipt made by bank; note originally given for sum which deposit receipt represents. Two securities are different sides of same transaction. Held right of set off, citing *West of England Bank* (1879) 27 W. R. 646; *Barrett's Case* (1865) 13 W. R. 559.

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See also the following unreported decisions in Ontario of the Master-in-Ordinary:

Re Ontario Express Co., Dawson Bros.' Case, 3rd July, 1893. Damages allowed to be set off against calls made prior to winding-up order, but not as to any calls enforceable after that date when mutuality of debts ceased and the right of set off is governed by s. 71 of Winding-up Act.

Re Canada Coal Co., Watson's Case, 17th Dec., 1895. Watson found liable as a contributory for $8,300.00, also under s. 123 of Act for moneys of the company received by him as managing director. He claimed to set-off against these liabilities his liability on a bond as surety for the company to the Delaware & Hudson Canal Co. Held, following *Maritime Bank* v. *Troop* (1888) 16 S. C. R. 456, that a contributory who was a creditor of a company could not set-off debt due to him by the company against calls made by the court in winding-up proceedings. Distinction drawn between calls made by directors and calls made by court in winding-up. In latter case debt not mutual. But surety does not become a creditor of principal debtor until he has actually paid the money, until then his liability is uncertain and contingent.

Position as to set-off different under English Bankruptcy Act applicable to insolvent persons. Robson's Law of Bankruptcy, p. 368. But surety upon general principles of equity has a right to be indemnified; directs payment into court to a separate account sufficient amount of his debt to liquidator as will cover his liability to D. & H. Canal Co. under the bond, money to be 'earmarked' and available for D. & H. Canal Co. and will not be dealt with without notice to Watson.

Time for sending in claims.

72. The court may fix a certain day or certain days on or within which creditors of the company may send in their claims, and may direct notice thereof to be given by the liquidator, and determine the manner in which notice of the day or days so fixed shall be given by the liquidator to the creditors. R. S., c. 129, s. 59.

The Minister of Finance having a claim against an insolvent bank has no *locus standi* to appeal from order

of the Referee barring all claims not filed and proved in response to advertisements: *Re Ontario Bank* (1916-7) 38 O. L. R. 242. Sect. 72.

If a claimant seeks to come in after the time allowed for filing claims he should show on affidavit the merit of his application and explain the cause of his delay: *In re Merchant's Life Assn. of Toronto, Hoover's Claim* (1902) 22 Occ. N. 21; *cf.* also s. 75.

As to corroboration of disputed claims: see *Josephs* v. *Morton* (1916) 26 D. L. R. 433.

Creditors required to prove claims.

73. The liquidator may give notice in writing to creditors who have sent in their claims to him, or of whose claims he has notice, and whose claims he considers should not be allowed without proof, requiring such creditors to attend before the court on a day to be named in such notice and prove their claims to the satisfaction of the court.

Disallowance on default.

2. In case any creditor does not attend in pursuance of such notice his claim shall be disallowed, unless the court sees fit to grant further time for the proof thereof.

Disallowance on hearing.

3. If any creditor attends in pursuance of such notice, the court may on hearing the matter allow or disallow the claim of such creditor in whole or in part. 52 V., c. 32, s. 14; 55-56 V., c. 28, s. 1.

The court can not make an order staying proceedings under the section pending the disposition of certain selected claims: *Re Dominion Trust Co., Critchley's Case* (1916) 27 D. L. R. 580.

As to delay by a creditor in demanding particulars of contestation by the liquidator: see *In re Montreal Cold Storage, &c., Co., Mullin's Claim* (1901-2) 4 Q. P. R. 340. See also *Re Stratford Fuel, Ice and Construction Co., Coughlin and Irwin's Claim* (1913) 28 O. L. R. 481, affirmed (1914-5) 50 S. C. R. 100.

Distribution of assets.

74. After the notices required by the two last preceding sections have been given, and the respective times therein specified have expired, and all claims of which proof has been required by due notice in writing by the liquidator in that behalf have been allowed or disallowed by the court in whole or in part, the liquidator may distribute the assets of the company or any part thereof among the persons entitled thereto and without reference to any claim against the company which shall not have then been sent to the liquidator.

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As to claims not sent in.

2. The liquidator shall not be liable to any person whose claim shall not have been sent in at the time of distributing such assets or part thereof for the assets or part thereof so distributed. R. S., c. 129, s. 60.

This section is for the protection of the liquidator. The actual distribution of the assets is governed by ss. 91 ff., which see.

Rank of claims sent in after the distribution has been commenced.

75. In case any claim or claims shall be sent in to the liquidator after any partial distribution of the assets of the company, such claim or claims, subject to proof and allowance as required by this Act, shall rank with other claims of creditors in any future distribution of assets of the company. R. S., c. 129, s. 60.

See s. 72, *supra*.

Secured Claims.

Duty of creditor holding security.

76. If a creditor holds security upon the estate of the company, he shall specify the nature and amount of such security in his claim, and shall therein, on his oath, put a specified value thereon. R. S., c. 129, s. 62.

Option of liquidator as to security.

77. The liquidator, under the authority of the court, may either consent to the retention by the creditor of the property and effects constituting such security or on which it attaches, at such specified value, or he may require from such creditor an assignment and delivery of such security, property and effects, at such specified value, to be paid by him out of the estate so soon as he has realized such security, together with interest on such value from the date of filing the claim till payment. R. S., c. 129, s. 62.

Ranking of secured creditor.

78. In case of such retention, the difference between the value at which the security is retained and the amount of the claim of such creditor shall be the amount for which he may rank as aforesaid. R. S., c. 129, s. 62.

Security by negotiable instrument.

79. If a creditor holds a claim based upon negotiable instruments upon which the company is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of the three last preceding sections, and shall put a value on the liability of the person primarily liable thereon as being his security for the payment thereof.

Revaluation.

2. After the maturity of such liability and its non-payment, he shall be entitled to amend and revalue his claim. R. S., c. 129, s. 62.

Sect. 80.

Security by mortgage or real property or a ship.

80. If the security consists of a mortgage upon ships o shipping, or upon real property, or of a registered judgment or an execution binding real property which is not by some other provision of this Act invalid for any purpose of creating a lien, claim or privilege upon the real or personal property of the company, the property mortgaged or bound by such security shall only be assigned and delivered to the creditor,—

Assignment with defective title.

(*a*) subject to all previous mortgages, judgments, executions, hypothecs and liens thereon, holding rank and priority before his claim; and,

Under obligation.

(*b*) upon his assuming and binding himself to pay all such previous mortgages, judgments, executions, hypothecs and liens; and,

Subject to indemnity.

(*c*) upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such previous mortgages, judgments, executions, hypothecs and liens. R. S., c. 129, s. 63.

In case of subsequent claims by.

81. If there are mortgages, judgments, executions, hypothecs, or liens upon such ships or shipping or real property subsequent to those of such creditor, he shall only obtain the property,—

Consent.

(*a*) by consent of the subsequently secured creditors; or,

Claims filed.

(*b*) upon their filing their claims specifying their security thereon as of no value; or,

Value paid.

(*c*) upon his paying them the value by them placed thereon; or,

Company indemnified.

(*d*) upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such subsequent mortgages, judgments, executions, hypothecs and liens. R. S., c. 129, s. 63.

Authority to retain necessary.

82. Upon a secured claim being filed, with a valuation of the security, the liquidator shall procure the authority of the court to consent to the retention of the security by the creditor, or shall require from him an assignment and delivery thereof. R. S., c. 129, s. 64.

Creditors holding security.

A creditor is a secured creditor if he has any security for his claim upon the property of the company: *Re Printing Co.* (1878) 8 Ch. D. 535. And a landlord who has exercised his right of distress before the winding-up, is a secured creditor: *Thomas* v. *Patent Lionite Co.* (1881) 17 Ch. D. 250, or a person who has obtained the appointment of a receiver before the winding-up: *Anglo-Italian Bank* v. *Davies* (1878) 9 Ch. D. 275.

A mechanics' lien is a secured claim under the Winding-up Act: *Re Empire Brewing and Malting Co., Rourke & Cass' Claims* (1892) 8 Man. 424.

Secs. 76-82.

Secured claims.

Where a security is transferred out and out to the creditor, he is not a secured creditor within the section: *Bourbeau Co.* v. *Stewart Macdonald Export Co.* (1917) Que. 26 K. B. 315.

Valuing securities.

Secured creditors cannot be compelled to file their claims and prove under the Act if they prefer to rely on their security and not ask to share in the distribution of the assets: *In re Brampton Gas Co.* (1902) 4 O. L. R. 509; *Capital Trust* v. *Yellowhead Pass Coal Co.* (1916) 27 D. L. R. 25; 9 A. L. R. 463. But see *In re The Lenora Mount Sicker Copper Co.* (1900-3) 9 B. C. R. 471. A creditor cannot withdraw his valuation or enforce his security: *Re British Columbia Pottery Co.* (1895) 4 B. C. R. 525; but where secured creditors without any intention to submit to the adjudication of their claims in the winding-up have filed affidavits in proof thereof leave has been granted for the withdrawal of the claims: *In re Brampton Gas Co., supra.*

As to the right of revaluing securities, see *Box* v. *Birds Hill Sand Co.* (1912) 8 D. L. R. 768; (1913) 12 D. L. R. 556; *Canada Furniture Co.* v. *Banning* (1918) 39 D. L. R. 313, 319.

When a creditor had inadvertently proved without valuing his security he was allowed to amend his proof: *Re Lake Winnipeg Transportation Co.* (1892) 8 Man. R. 463; *Re Henry Lister & Co.* [1892] 2 Ch. 417, and see *Re Schofield* (1879) 12 Ch. D. 337; *Re Arden* (1884) 14 Q. B. D. 121; *Re Barned's Banking Co.,* 18 W. R. 944.

When a mortgage is made by a company to a trustee to secure several creditors of the company, any one creditor has the right to value his interest in such security and maintain his claim on the estate except as reduced by such valuation. The liquidator cannot insist on either getting an assignment of the whole security or relegating him to his rights under the security and refusing to let him rank, but can only force him to assign his interest therein. The principle of the Act in reference to secured creditors is one of election and not forfeiture: *Re Thunder Hill & Bowker* (1896) 5 B. C. R. 21, and see *Moor* v. *Anglo-Italian Bank,* 10 Ch. D. 681, p. 689; *Ex p. Schofield* (1879) 40 L. T., N. S. 464, 823; *Re Lister* [1892] 2 Ch. 417.

As to the right of creditor to rank on estates of joint debtors and also prove under above section, see *Ontario Bank* v. *Chaplin* (1891) 20 S. C. R. 152.

A secured creditor who has exhausted his security without satisfying his debt is not entitled to apply the proceeds of the security in payment, first of interest subsequent to the winding-up and then in reduction of principal and to prove in the winding-up for the balance of the principal. His proof must be limited to what was due for principal and interest at the commencement of the winding-up after deducting therefrom proceeds of sale or realization received in respect of the security: *Re London, etc., Hotels Co.* [1892] 1 Ch. 639, following *Ex p. Penfold* (1871) 4 D. G. & Sm. 282. It should be noted, however, that these cases were decided under the English Rules.

A secured creditor has a right to apply for and obtain leave to bring or proceed with an action for enforcing his securities: *Lloyd* v. *David Lloyd & Co.* (1877) 6 Ch. D. 339: *Longdendale, etc., Co.* (1878) 8 Ch. D. 150; *Joshua Stubbs, Ltd.* [1891] 1 Ch. 475; *London, etc., Hotel Co.* [1892] 1 Ch. 639.

The mere fact that a winding-up order has been made does not prevent a debenture holder or mortgagee of the company from bringing an action to realize his security: *In re Longdendale Cotton Co.* (1878) 8 Ch. D. 150; and in *Lloyd* v. *David Lloyd & Co.* (1877) 6 Ch. D. 339, it was held that when an order has been made to wind up a company a mortgagee who has commenced an action against the company to realize his security ought to have leave under section 87 (our section 22) to proceed with his action under special circumstances or unless he can obtain the same relief in the winding-up. And see *In re Joshua Stubbs, Limited* [1891] 1 Ch. 187.

So also a trustee for bondholders may cause himself to be put into possession of the assets without prejudice to the rights of privileged creditors: *Canadian Brass, &c., Co.* v. *Duclos* (1917-8) Que. 18 P. R. 206.

In Alberta it has been held that leave cannot be refused on an application under the Alberta Winding-up

Secs. 76-82.

Secured claims.

Rules unless the Court is prepared to say that the mortgagee's claim will be at once recognized and allowed in the liquidation proceedings: *Capital Trust* v. *Yellowhead Pass, &c.* (1916) 33 W. L. R. 873. See further the note under "Bonds," *supra*, at p. 406, where the matter is discussed; also s. 133, *infra*.

On a petition by a mortgagee in the winding-up proceedings, under the Act, asking for the conveyance to him by the liquidator of the company's equity of redemption, the Court has jurisdiction to make the usual order for foreclosure or sale. It is a matter of discretion with the Court whether an action will be directed or summary proceedings sanctioned: *Re Essey Land and Timber Co.; Trout's Case* (1892) 21 O. R. 367.

The Court ought not to confirm a sale by a mortgagee from the company, until the security has been valued, and offered to the liquidator at that value: *Re Thunder Hill Mining Co.* (1894) 3 B. C. R. 351.

A secured creditor who realizes his security is entitled to apply the proceeds in or towards payment of his principal, interest, and costs: *London, Windsor, etc., Co.* [1892] 1 Ch. D. 639.

A subsequent encumbrancer is not bound to prove as a secured creditor where the property has already been surrendered under the Act to a prior mortgagee, and can, therefore, not be given up to the claimant as required by s. 76: *In re Ottawa Porcelain Co.* (1900) 31 O. R. 679, 692.

As to compromise of secured claims and double ranking, see *Re Stratford Fuel Ice, etc., Co., Coughlin and Irwin's Claim* (1913) 28 O. L. R. 481 affirmed as *Brown* v. *Coughlin* (1914-5) 50 S. C. R. 100.

The Crown has no right to displace creditors holding a security upon specific assets: *Re Imperial Paper Mills, Diehl* v. *Carritt* (1915) 7 O. W. N. 630.

Dividend Sheet.

Must provide for privileged and secured claims.

83. In the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, but no dividend shall be allotted or paid to any creditor holding security upon the estate of the company for his claim until the amount for which he may rank as a creditor upon the estate,

as to dividends therefrom, is established as herein provided. R. S., c. 129, s. 65. Secs. 83-84.

84. No lien or privilege shall be created— No lien by execution, etc., after commencement of winding up.

(*a*) upon the real or personal property of the company, for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company;

(*b*) upon the real or personal property of the company, or upon any debts due or accruing or becoming due to the company, by the filing or registering of any memorial or minute of judgment, or by the issue or taking out of any attachment or garnishee order or other process or proceeding;—

if, before payment over to the plaintiff of the moneys actually levied, paid or received under such writ, memorial, minute, attachment, garnishee order or other process or proceeding, the winding up of the business of the company has commenced: Provided that this section shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the province in which such writ, attachment, garnishee order or other process or proceeding was issued or taken out (7-8 Ed. VII., c. 75, s. 1). Lien for costs excepted.

Compare Imperial Bankruptcy Act, 1883, s. 45; Ontario Assignments and Preferences Act, R. S. O. 1914, c. 64, s. 14.

The effect of this and other sections is to show that 'the power of dealing with and collecting the assets after the making of the winding-up order is vested in the liquidator alone': *Shaver* v. *Cotton* (1896) 13 A. R. 426, per Osler, J.A., at p. 434. The section goes 'only to the extent of prohibiting the *creation* of any lien or privilege by the issue or delivery to the sheriff of any execution, or by the filing or registering of any memorial of judgment, or by the issue or making of any attachment or garnishee order or other process or proceeding,' per Barry, J., in *Good* v. *Nepisiguit Lumber Co.* (1911-13) 41 N. B. R. 57, at p. 75. It applies only to judicial proceedings: *E. C. Colwell Candy Co.* (1899-02) 35 N. B. R. 613; *Re Shirleys' Ltd.* (1916) 29 D. L. R. 273, and to proceedings commenced before the winding-up, *ibid.*

Sect. 84.

Lien or privilege.

'The expression lien is generally used to designate a right which a party has to retain that which is in his possession or power until certain demands are satisfied, and a particular lien may arise by mere operation of law:' *In re Heyden,* 29 U. C. Q. B. 262, 264. 'The word privilege is frequently used in the Lower Canada laws as referring to certain preferential or secured rights or claims, and in all probability that word was used in reference to that province, and the word lien as applicable to Upper Canada,' *ibid.,* 263, 264.

Application of the section.

The section does not destroy mechanics' liens, so that a lien duly registered for materials supplied and work done prior to the service of the winding-up petition will have priority over ordinary creditors: *Re Clinton Thresher Co.* (1910) 15 O. W. R. 319; 1 O. W. N. 455; *Re The Empire Brewing and Malting Co., Rourke and Cass' Claim* (1891) 8 Man. R. 424; and see *Re Ibex Co.* (1902) 9 B. C. R. 557. The lien arises by virtue of doing the work and registering the statement of claim: *Re The Empire Brewing Co., supra.* If the statement of claim required by the Mechanics' Lien Act has not been filed before the winding-up leave should be obtained under s. 22.

Mechanics' liens.

Woodmen's liens.

Similarly as regards liens under the Woodmen's Lien Act, C. S. N. B., 1903, c. 148, the lien arises when the work is done: *Good* v. *Nepisiguit Lumber Co.* (1911-13) 41 N. B. R. 57. In both cases the plaintiffs will be entitled to an order allowing them to proceed and enforce their liens.

While the lien holders will be prevented by s. 23 from pursuing their remedies without leave, which is obtainable by an order of the Court on summary petition under s. 133, s. 23 does not apply to the mere filing of a claim of lien. Such may be filed after the winding-up has commenced without obtaining permission: *Good* v. *Nepisiguit, supra.,* at p. 74.

Section 84 applies to the creation and not to the enforcement of a lien, and both sections 23 and 84 apply to creditors only and not to outsiders: *Good* v. *Nepisiguit, supra.* So in the last mentioned case where the plaintiffs (woodsmen employed by contrac-

tors who were engaged in cutting timber for a company subsequently ordered to be wound up) were not creditors of the company, it was held that s. 84 did not stand in their way so as to prevent them from enforcing their lien. Sect. 84.

For a case where maritime liens for seamen's wages were considered see *In re The Fort George Lumber Co.* (1913) 48 S. C. R. 593.

With respect to a solicitor's lien the share register and minute book are not subject to such lien which the directors have no power to create; as to other documents which come into the solicitor's hands pending the winding-up the solicitor can not assert any lien which would interfere with the conduct of the winding-up; but as to documents regarding which there is no special provision in the Companies Act or the governing documents of the company, *e.g.*, letters of application and other papers relating to the allotment of shares, the winding-up order will not defeat any existing valid lien: *In re Capital Fire Assurance Association* (1883) 24 Ch. D. 408; *Re Residential Building Co.* (1916) 26 Man. L. R. 638, distinguishing *Re Alpha Mortgage, &c., Co.*, 22 B. C. R. 513. Production of such documents could, however, be compelled under s. 119. Lien on documents.

See also *Re Boston Wood Rim Co.* (1904) 5 O. W. R. 149. Where documents come into the hands of solicitors in the general course of their business for the company, they have only a "passive" or "retaining" lien thereon. Production of such documents "without prejudice" to such lien will not confer priority on their claim over the claims of other creditors: *Executors and Administrators Trust Co.* v. *Seaborn* (1916) 27 D. L. R. 427. See also s. 120.

Where a landlord has become entitled to a preferential lien for rent conferred on him by s. 38 of the Landlord and Tenant Act, R. S. O. 1914, c. 155, on an assignment for the benefit of the creditors of the lessee occurring, if the lessee company is subsequently wound up under the Winding-up Act the assets to which the Preferential claims of landlords.

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Liens.

lien attached vest in the liquidator subject to the lien, and if any order of the Court is required to make the lien available it may be granted: *Re Fashion Shop Co.* (1915) 33 O. L. R. 253; 21 D. L. R. 478. See also *Brodeur Company* v. *Merrill* (1917) 26 Que. K. B. 461.

Where a landlord has already distrained before the winding-up order was made, the distress will not be invalidated by the order, for s. 22 only applies to proceedings taken after the order is made: *E. C. Colwell Candy Co.* (1899-02) 35 N. B. R. 613. So also a constructive seizure under verbal arrangement between agents of the lessor and lessee prior to the winding-up order will entitle the landlord to hold the goods distrained as against the liquidator: *Re Shirleys, Ltd.* (1916) 29 D. L. R. 273. The majority of the Court in *E. C. Colwell Candy Co., supra,* necessarily held that a distress is not a "proceeding" within the meaning of s. 84. Boyd, C., in *Fuches* v. *Hamilton Tribune* (1884) 10 P. R. 409, took a different view, stating that s. 84 was fatal to a claim for a preference, if, before the payment over of the moneys, made under the distress, the winding-up of the company had commenced. It should be observed, however, in that case that no steps had been taken by the lessors to assert their claim until the winding-up had begun. The view of Boyd, C., was disapproved and *E. C. Colwell Candy Co.* followed in *Re Shirleys, Ltd.* (1916) 29 D. L. R. 273, where the Court held that a distress levied before the winding-up, not being a judicial proceeding, was not affected by the section. So also where the company had taken possession under a lease in pursuance of an invalid resolution, it was held that the company accepted the tenancy on the terms set forth in the resolution and the landlord was entitled to his preferential lien where he had distrained before the winding-up: *Re D. & S. Drug Co.* (1917) 31 D. L. R. 643.

Executions.

The result of the section is that a writ of execution can not become a lien on the property of the company after the service of notice of presentation of the winding-up petition, which is the date of the commencement of the winding-up: *In re Ideal House Furnishing Co.,*

Stewart McDonald Co. Case (1907-8) 17 Man. L. R. 576. In that case Mathers, J., doubted what the result would be under s. 84 as it then stood where the sheriff had sold the goods of the company and had the proceeds of sale in his hands when notice of the petition was served, observing that under the prior Act, R. S. C. 1886, c. 129, s. 66, where the section was not sub-divided into subsections as in R. S. C. 1906 c. 144, s. 84, the money would have become the property of the liquidator. The section was subsequently repealed by 7 & 8 Ed. VII. c. 75, and a new section substituted under which this result would presumably follow.

Lien for costs excepted.

A judgment creditor who has an execution in the sheriff's hands at the commencement of the winding-up is protected to the extent of his costs: *Re Heyden*, 29 U. C. Q. B. 262; *Re Fair and Burt*, 2 U. C. L. J. N. S. 216. The fees of the sheriff will also be allowed up to a certain date, *e.g.*, where a sheriff was entitled to hold goods seized before the winding-up until an order was made for their delivery up to the liquidator his fees and possession money were allowed until the date of such order: *Re Oshawa Heat, Light and Power Co.* (1906) 8 O. W. R. 414. A sheriff is not entitled to poundage or possession money under an execution levied subsequently to a winding-up order, the seizure being illegal under s. 23; and a payment out of the company's funds to avoid or in consequence of such a seizure is illegal and can be demanded back by the liquidator: *Richards* v. *Producers, &c., Co.* (1914) 17 D. L. R. 588. Assuming a legal seizure, the onus is on the sheriff claiming poundage to satisfy the Court that a compromise payment is the direct consequence of the seizure and not an agreement entered into previously between the parties, *ibid.* See also the following decision (unreported) of the Master-in-Ordinary in Ontario: *Re Zoological, &c., Society; Re Piper Ex p. Boswell & Galt.* Solicitors held entitled to a lien on a fund coming to H. L. Piper or his assignee in respect of the costs incurred in establishing the right of Piper to the fund, and also for the costs of defending Piper from the claim made upon him in the winding-up proceedings as an alleged contributory.

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If the *fi. fa.* is not in the sheriff's hands to be executed, but he has instructions not to seize, there is no lien for costs: *Re Saw Bill Lake, &c., Co.* (1903) 2 O. W. R. 1143.

Contestation of Claims.

Claims or dividend may be objected to.

85. Any liquidator, creditor or contributory, or shareholder or member may object to any claim filed with the liquidator, or to any dividend declared. R. S., c. 129, s. 67; 52 V., c. 32, s. 15.

Objections to be filed in writing.

86. If a claim or dividend is objected to, the objections shall be filed in writing with the liquidator, together with the evidence of the previous service of a copy thereof on the claimant.

Answers and replies.

2. The claimant shall have six days to answer the objections, or such further time as the court allows, and the contestant shall have three days to reply, or such further time as the court allows. R. S., c. 129, 67.

Day to be fixed for hearing.

87. Upon the completion of the issues upon the objections, the liquidator shall transmit to the court all necessary papers relating to the contestation, and the court shall then, on the application of either party, fix a day for taking evidence upon the contestation, and hearing and determining the same. R. S., c. 129, s. 67.

Costs.

88. The court may make such order as seems proper in respect to the payment of the costs of the contestation by either party or out of the estate of the company. R. S., c. 129, s. 67.

Default in answer by claimant.

89. If, after a claim or dividend has been duly objected to, the claimant does not answer the objections, the court may, on the application of the contestant, make an order barring the claim or correcting the dividend, or may make such other order in reference thereto as appears right. R. S., c. 129, s. 67.

Security for costs.

90. The court may order the person objecting to a claim or dividend to give security for the costs of the contestation within a limited time, and may, in default, dismiss the contestation or stay proceedings thereon, upon such terms as the court thinks just. R. S., c. 129, s. 67.

Section 85 applies only to those claims which are made in the winding-up proceedings and since a secured creditor is not bound to enter such claims for the purpose of enforcing his security a general creditor has no standing to attack such security, the enforcement of

which is sought by an independent foreclosure action: *Capital Trust* v. *Yellowhead Pass Coal Co.* (1916) 27 D. L. R. 25; 9 A. L. R. 463; but cf. *Re The Lenora Mount Sicker, &c., Co.* (1900-3) 9 B. C. R. 471. Secs. 85-90.

See *Ward* v. *Montreal Cold Storage Co.* (1904) Que. 26 S. C. 310; *Re Standard Cobalt* (1911) 18 O. W. R. 555.

The liquidator may not, by counterclaiming for damages against a director by way of contestation of the latter's claim against the company as a creditor, in effect take misfeasance proceedings against him: *Re Boston Shoe Co.* (1914) 16 D. L. R. 856. See *Re Union Brewery Co.* (1903-4) 6 Que. P. R. 395; *Re Laurie Engine Co.* (1907) 8 Que. P. R. 59.

As to a claimant obtaining security for costs from a contesting creditor, see *In re Montreal Cold Storage and Freezing Co., Ltd.* (1901-2) 4 Que. P. R. 294.

Distribution of Assets.

91. The property of the company shall be applied in satisfaction of its debts and liabilities, and the charges, costs and expenses incurred in winding-up its affairs. R. S., c. 129, s. 58. Distribution of property of company.

92. All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company, in priority to all other claims. R. S., c. 129, s. 91. Winding-up expenses payable out of estate.

The effect of the section is to confer priority only on claims against the company in existence at the time when it went into liquidation. Thus, where an order authorizing a loan to a liquidator provided that the loan should be a first charge on the assets subject only to existing liens, charges or encumbrances, the lender was held entitled to priority over the costs and charges of the winding-up proceedings, including the liquidator's costs and the solicitors' fees: *Keyes* v. *Hanington* (1913) 13 D. L. R. 139.

Where a company in liquidation is a party to an action and costs are given against it these take priority over the costs of the winding-up: *In re Home Invest-*

Secs. 91-92.

Distribution of assets.

ment Society (1880) 14 Ch. D. 167; *Pacific Coast Syndicate* (1913) 2 Ch. 263. In such a case the party awarded costs is entitled to immediate payment: *In re Dominion of Canada Plumbago Co.* (1884) 27 Ch. D. 33. This priority in favor of the successful litigant does not extend to assets realized by litigation undertaken by the liquidator, the costs of which have not been paid: *In re Baden Machinery Co.* (1906) 12 O. L. R. 634, 636. In the same case it was held that the liquidator should also have priority for a reasonable sum as his compensation for his care and trouble in such realization.

See also *Re People's Trust Co.* (1918) 25 B. C. R. 138; *Scott* v. *Siemens* (1912) 18 O. W. R. 538.

Distribution of surplus of property of company.

93. The Court shall distribute among the persons entitled thereto any surplus that remains after satisfaction of the debts and liabilities of the company, and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation, any property or assets remaining after such satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company. R. S., c. 129, ss. 51 and 58.

After the company's creditors have been paid and the costs of the winding-up have been satisfied it is the duty of the liquidator to divide the balance (if any) of the assets among the shareholders or members of the company. Such distribution will be made among them according to their rights under the provisions of the letters patent and by-laws or memorandum and articles of association.

Return of capital.

Preference shares commonly carry a preferential right to the return of capital on a winding-up, in which case the amounts paid in by the preference shareholders must be repaid to them before the common shareholders get anything. See further the notes to s. 47 of the Companies Act.

Where the preference shares do not confer such right or where the shareholders are all of one class, the surplus assets (unless there is some provision to the contrary in the governing documents) are divisible

among the shareholders equally: *In re London India Rubber Co.* (1867) 5 Eq. 519. Secs. 91-92.

If some shareholders have paid more than others, the liquidator may make calls pursuant to s. 57 for the purpose of adjusting the rights of the contributories: *Ex parte Maude* (1871) 6 Ch. 51, 55; see also *Re Monarch Bank of Canada* (1913) 32 O. L. R. 207. Where the assets are sufficient to permit of equalization without the making of calls, the surplus will be paid to the shareholders who have paid more than others to the extent of such excess and the balance only will be equally divisible among all the shareholders: *Re Wakefield Rolling Stock Co.* (1892) 3 Ch. 165. See also *Re Colonial Assurance Co., Ltd.* (1916) 29 D. L. R. 488.

Further participation after return of capital.

Whether the preference shareholders will be entitled to participate in the surplus assets after the capital has been returned on all the shares depends on the construction of the documents whereby the rights of the preference shareholders are defined. In the absence of restrictive provisions they do so participate with all the shareholders in proportion to the nominal value of the shares where the shares are of unequal amount: *Re Espuela Cattle Co. No.* 2 (1909) 2 Ch. 187. See also the notes under s. 47 of the Companies Act. Where the right of the preference shareholders to participate further was excluded the common shareholders were held entitled to the surplus after repayment of capital to all shareholders, such surplus being divisible in proportion to the amount of their shares and not the amount paid thereon: *Morrow* v. *Peterborough Water Co.* (1902) 4 O. L. R. 324, following *Birch* v. *Cropper* (1889) 14 App. Cas. 525.

Payment in advance of calls.

Where payments have been made by shareholders in advance of calls, as may be done under s. 61 of the Dominion Companies Act, such shareholders are entitled to the return of such sums with interest before other shareholders of equal rank receive anything: *Re Wakefield Rolling Stock Co.* (1892) 3 Ch. 165, 174.

Sect. 94. **Fraudulent Preferences.**

Gratuitous contracts presumed to be with intent to defraud creditors.

94. All gratuitous contracts, or conveyances or contracts without consideration, or with a merely nominal consideration, respecting either real or personal property, made by a company in respect to which a winding-up order under this Act is afterwards made, with or to any person whatsoever, whether a creditor of the company or not, within three months next preceding the commencement of the winding-up, or at any time afterwards, shall be presumed to have been made with intent to defraud the creditors of such company. R. S., c. 129, s. 68.

Contracts injuring or obstructing creditors presumed to be with like intent.

95. All contracts by which creditors are injured, obstructed or delayed, made by a company unable to meet its engagements, and in respect to which a winding-up order under this Act is afterwards made, with a person whether a creditor of the company or not, who knows such inability or has probable cause for believing such inability to exist, or after such inability is public and notorious, shall be presumed to be made with intent to defraud the creditors of such company. R. S., c. 129, s. 68.

Compare Dominion Insolvent Act, 1875, s. 130, and the Dominion Insolvent Act, 1869, s. 86.

Compare also the Imperial Companies' Act, 1862, s. 164, by which the bankruptcy law regarding fraudulent preferences, for the time being in force, is made applicable to a company being wound up under the Imperial Act.

Two classes of contracts are, under ss. 94 and 95, presumed to be made with intent to defraud creditors:

(1) Those made without consideration, or with a merely nominal consideration, within three months before, or at any time after the commencement of the winding-up (s. 94).

(2) Those in which there may be consideration, but which are made with a person who knows, or has probable cause for believing the company to be unable to meet its engagements, and in respect of which a winding-up order under the Act is afterwards made, if such contracts injure, obstruct or delay creditors (s. 95): *Skinner* v. *McLeod*, 15 N. B., 2 Pugs. 134. In *Newton* v. *Ontario Bank*, 13 Gr. 652, it was said that the second branch of s. 130 and s. 132 of the Insolvent Act, corresponding to s. 95 and s. 97 of the Winding-up Act might be read together, and that the latter section was

in substance a re-enactment of 13 Eliz., c. 5, and did not apply to creditors. But the section as it now stands is expressly made applicable to creditors. Secs. 94-95.

An overdue debt is consideration which takes the case out of the section: *Adams* v. *Bank of Montreal* (1901-2) 32 S. C. R. 719. A mortgage is included in the term 'contract:' *Canadian Bank of Commerce* v. *Smith* (1911) 17 W. L. R. 135; *Hammond* v. *Bank of Ottawa* (1910) 22 O. L. R. 73. Gratuitous contracts.

The presumption of intent to defraud creditors arising from the transaction taking place within three months of the winding-up is rebuttable: *Hammond* v. *Bank of Ottawa, supra.* In this case pressure by the creditor was shown. See also *Campbell* v. *Barrie* (1871) 31 U. C. R. 279, 298, 290.

The expression 'unable to meet its engagements,' points to an insufficiency of assets if realized under fair conditions: *Canadian Bank of Commerce* v. *Smith* (1911) 17 W. L. R. 135, 143; *Dominion Bank* v. *Cowan* (1887) 14 O. R. 465.

The phrase 'with a person who knows such inability, or has probable cause for believing such inability to exist' does not import actual knowledge on the part of the creditor, nor does it seem necessary that he should have any actual belief on the subject, and belief will not protect a party if there is probable cause for believing otherwise: *Davidson* v. *McInnes,* 24 Gr. 414.

The presumption mentioned in s. 95 is rebuttable on proof of pressure by the creditor: *Adams* v. *Bank of Montreal* (1901-2) 32 S. C. R. 719, affirming (1896-01) 8 B. C. R. 314.

The following are cases in which the transaction was set aside under the combined effect of the sections of the Insolvency Act corresponding to these sections and s. 97: *Payne* v. *Hendry* (1873) 20 Gr. 142; *Coates* v. *Joselin* (1866) 12 Gr. 524; *Brooks* v. *Taylor* (1876) 26 C. P. 443; *Churcher* v. *Cousins* (1869) 29 U. C. R. 540; *McFarlane* v. *McDonald* (1874) 21 Gr. 319; *Squire* v. *Watt* (1869) 29 U. C. R. 328; *Newton* v. *Ontario Bank* (1869) 15 Gr. 283; Appeal from 13 Gr. 652.

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Contracts with consideration voidable when.

96. A contract or conveyance for consideration, respecting either real or personal property, by which creditors are injured or obstructed, made by a company unable to meet its engagements with a person ignorant of such inability, whether a creditor of the company or not, and before such inability has become public and notorious, but within thirty days next before the commencement of the winding-up of the business of such company under this Act, or at any time afterwards, is voidable, and may be set aside by any court of competent jurisdiction, upon such terms as to the protection of such person from actual loss or liability by reason of such contract as the court orders. R. S., c. 129, s. 69.

Compare section 131 of the Insolvency Act of 1875, and section 87 of the Insolvency Act, 1869.

In the following cases the transaction was set aside as a fraud on creditors: *Black* v. *Fountain* (1876) 23 Gr. 174; *Masson* v. *McGowan,* 2 L. C. L. J. 37.

The section does not apply where the purchaser receives full value for the goods he buys: *Bank of Montreal* v. *MacWhirter* (1867) 17 C. P. 506.

Where the transferee knows that the debtor is unable to meet his obligations the provision as to protection does not apply: *Kalus* v. *Hergert* (1875) 1 A. R. 75. See also *Mathers* v. *Lynch* (1867) 27 U. C. R. 244; and *Skinner* v. *McLeod,* 15 N. B., 2 Pugsley 134.

See also *Walter* v. *Leduc* (1915) 8 W. W. R. 360; *Larue* v. *Dohan* (1915) 48 Que. S. C. 374.

Contracts made with intent to defraud or delay creditors. void.

97. All contracts or conveyances made and acts done by a company respecting either real or personal property, with intent fraudulently to impede, obstruct or delay the creditors of the company in their remedies against the company, or with intent to defraud the creditors of the company or any of them, and so made, done and intended with the knowledge of the person contracting or acting with the company, whether a creditor of the company or not, and which have the effect of impeding, obstructing or delaying the creditors in their remedies, or of injuring them, or any of them, shall be null and void. R. S., c. 129, s. 70.

Compare section 132 of the Dominion Insolvency Act, 1875, and section 88 of the Dominion Insolvency Act, 1869.

The usual interpretation placed upon the word 'void' in acts of this kind is 'voidable': *The Meri-*

den Britannia Co. v. *Braden* (1894) 21 A. R. 352. And the latter case would seem to indicate that a good title can be conferred by a person who holds what is under the Act a void title: *In re Van Sittart* [1893] 2 Q. B. 277; *In re Brall* [1893] 2 Q. B. 381; *In re Carter and Kenderdine's Contract* (1897) 1 Ch. 776. Sect. 97.

A banking firm in Toronto having become embarrassed applied to the plaintiffs, to whom they had owed $50,000, to advance $15,000 more, the debtors agreeing to secure both debts by a mortgage on the real estate of one of the partners. The plaintiffs made the advance and obtained the mortgage. In less than three months thereafter the debtors became insolvent. Though they were indebted beyond their means of paying at the time of executing the mortgage, yet they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay their creditors. As respecting the antecedent debt it was held that the mortgage was valid as against the assignee: *Royal Canadian Bank* v. *Kerr* (1870) 17 Gr. 47.

See also the following cases adopting the same principle: *Allan* v. *Clarkson* (1870) 17 Gr. 570; *Risk* v. *Sleemin* (1874) 21 Gr. 250; *Jackson* v. *Bowman* (1867) 14 Gr. 156; *Hyman* v. *Cuthbertson* (1886) 10 O. R. 433; *Ross* v. *Dunn* (1886) 16 A. R. 552.

Actual knowledge on the part of the creditor, not mere constructive notice, is necessary under this clause. A note given in violation of the law laid down in this section has been held to be an absolute nullity and to be void, *ab initio*, even in the hands of a third party who was an innocent holder for value before maturity: *Davis* v. *Muir* (1869) 13 L. C. J. 184.

Sale or transfer in contemplation of insolvency.

98. If any sale, deposit, pledge or transfer is made of any property, real or personal, by a company in contemplation of insolvency under this Act, by way of security for payment to any creditor, or if any property real or personal, movable or immovable, goods, effects or valuable security, are given by way of payment by such company to any creditor, whereby such credi-

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tor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void; and the subject thereof may be recovered back for the benefit of the estate by the liquidator, in any court of competent jurisdiction.

Presumption if within thirty days.

2. If such sale, deposit, pledge or transfer is made within thirty days next before the commencement of the winding-up under this Act, or at any time afterwards, it shall be presumed to have been so made in contemplation of insolvency. R. S., c. 129, s. 71.

Fraudulent Preferences.

Fraudulent preferences.

This section is taken from and is substantially the same as section 133 of the Dominion Insolvent Act of 1875, which was taken from section 89 of the Act of 1869.

There are two points to be noted in connection with the section. First, that the doctrine of pressure has been held not to apply; secondly, that the presumption that if made within 30 days it is made in contemplation of insolvency, is rebuttable.

The case of *Davidson* v. *Ross* (1876) 24 Gr. 22, decided that the doctrine of pressure had no application to this section.

The cases decided under the English Bankruptcy Acts were distinguished on the ground that there the intention is made an ingredient, while under this section it is simply a question of what *effect* the transfer, etc., will have coupled with the contemplation of insolvency. "If it has the effect of preventing the ratable distribution of an insolvent estate by transferring assets in security for or satisfaction of a claim which would not be entitled to priority over the claims of general creditors upon insolvency supervening," it is an unjust preference. Moss, J., at p. 60.

The Court in this case was divided as to whether the presumption referred to in the latter half of the section was rebuttable. It has since been held to be rebuttable: *Kirby* v. *Rathbun*, 32 O. R. 9. And see *Webster* v. *Crickmore*, 25 A. R. 97, which was decided under the Ontario Act respecting assignments and preferences; and see *Lawson* v. *McGeoch*, 22 O. R. 474, 20 A. R. 464.

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It remains to be considered whether the decision of *Davidson* v. *Ross* has been overruled by decisions on similar enactments such as the Ontario Assignments Act. In this connection it should be observed that the wording of the section under which *Davidson* v. *Ross* was decided was so far as material identical with the wording of the section under consideration, and we should be careful in coming to the conclusion that it is overruled by cases decided under sections differently worded. It should also be noted that the case of *The Bank of Australasia* v. *Harris*, 15 Moo. P. C. 97, and *Harris* v. *The Bank of Australasia, ibid.*, 116, were cited in *Davidson* v. *Ross*. Now the wording of the section under consideration in *The Bank of Australasia* v. *Harris*, and that of the sections under consideration in such cases as *Molsons Bank* v. *Halter*, 18 S. C. R. 88, and *Stephens* v. *McArthur*, 19 S. C. R. 446, might appear to be practically identical with this section; but the Court in *Davidson* v. *Ross* held that there was a distinction between a 'preference,' which under the English decisions had been held to mean fraudulent preference and rebuttable by pressure, and an 'unjust preference,' which the Court in *Davidson* v. *Ross* held not to mean a fraudulent preference and not rebuttable by pressure. See Judgment of Moss, J., at pp. 81, 82, 83.

On the above grounds it is submitted that the decisions on the Ontario Assignments Act and similar enactments as to pressure do not apply to this section, that *Davidson* v. *Ross* is still good law, and that therefore under the above enactment pressure will not validate a transaction 'whereby such creditor obtains or will obtain an unjust preference.' And see *Kirby* v. *Rathbun, supra; Adams* v. *McCall*, 25 U. C. R. 219.

For the convenience of readers desiring to consider the above point further a list is here given of the principal cases decided on the question of pressure:—*Stephens* v. *McArthur* (1891) 19 S. C. R. 454; *Molsons Bank* v. *Halter* (1890) 18 S. C. R. 88; *Ivey* v. *Knox*, 8 O. R. 451; *Brayley* v. *Ellis*, 10 O. R. 119; *Long* v. *Hancock*, 12 A. R. 137; *Johnson* v. *Hope*,

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17 A. R. 10; *Davies* v. *Gillard,* 21 O. R. 431; *Beattie* v. *Wenger,* 24 A. R. 72; *Lawson* v. *McGeoch,* 20 A. R. 464; *Webster* v. *Crickmore,* 25 A. R. 97; *Gas Light Co.* v. *Terrell,* L. R. 10 Eq. 168; *Buckley's Case* [1899] 2 Ch. 725.

It is not an unjust preference when the transfer is made in pursuance of a *bonâ fide* agreement to give a security in return for an advance made, if the agreement is made more than thirty days before the commencement of the winding-up: *Suter* v. *The Merchants Bank,* 24 Gr. 365; *Re Central Bank,* 21 O. R. 515; *Newton* v. *Ontario Bank,* 13 Gr. 652; *Allan* v. *Clarkson,* 17 Gr. 570; *Smith* v. *McLean,* 25 Gr. 567, but see *Kalus* v. *Hergert,* 1 A. R. 75. But where the taking of the security is deliberately postponed till the debtors are insolvent it cannot be sustained: *Webster* v. *Crickmore,* 25 A. R. 97; *Breese* v. *Knox,* 24 A. R. 203; *Jones* v. *Kinney,* 11 S. C. R. 708.

Contemplation of Insolvency.

Contemplation of insolvency.

In *Marsh* v. *Sweeny,* 15 N. B., 2 Pugsley 454, decided under the corresponding section in the Insolvency Act of 1869, which section did not contain the words "under this Act" it was held that the words "in contemplation of insolvency" did not mean in contemplation of insolvency under the Act.

The meaning of this phrase was explained by Patterson, J., at p. 69 of the case of *Davidson* v. *Ross* as follows:—

'I take the object of the law to be to make it the duty of a trader who from the knowledge which he has of his own affairs or of the intentions of his creditors, has reason to apprehend either that proceedings under the Act will be taken against him or that he may have to resort to the Act for relief, to do nothing which will prejudice the ratable distribution of his assets, by giving one creditor an unjust preference over the others, and I apprehend that if under such circumstances he gives a preference he does so in contemplation of insolvency, whether he does it from a desire to favor the preferred creditor or only because that

creditor has succeeded by urgency in overcoming his reluctance to give the preference.' Sect. 98.

Moss, J.A., p. 87, citing *Gibson* v. *Muskett*, 4 M. & G. 160, says that money was paid in contemplation of bankruptcy 'if it was paid under such circumstances that any prudent man taking a reasonable view of his situation and the surrounding circumstances at the time might fairly expect bankruptcy would follow.'

It should be observed that the presumption referred to in the section is a presumption that the transfer, etc., was made in contemplation of insolvency. This presumption is not displaced by merely showing that the sale or transfer was *bonâ fide* or that the creditor did not know or had not probable cause for believing the insolvent was unable to meet his engagements: *Evans* v. *Ross* (1879) 30 U. C. C. P. 121.

As to the meaning of the words 'in contemplation of insolvency' see *Morgan* v. *Brundrett*, 5 B. & Ad. 296, which supports the view that actual insolvency must be expected by the debtor at the time of the transaction. See also *Atkinson* v. *Brindall*, 2 Bing. N. C. 225. See *Gibson* v. *Brand*, 4 M. & G. 179; *Ex p. Simson*, DeG. 9. If circumstances from which an ordinary man would conclude that a debtor was unable to meet his liabilities, knowledge of insolvency may be presumed: *National Bank of Australasia* v. *Morris* [1892] A. C. 287.

As to the meaning of pledge see *Canadian Bank of Commerce* v. *Smith* (1911) 17 W. L. R. 135.

See further as to unjust preference *Smyth* v. *Morton*, 30 C. P. 566. See also *City Bank* v. *Smyth*, 20 C. P. 93; *McWhirter* v. *Thorne*, 19 C. P. 302; *Churcher* v. *Cousins*, 29 U. C. R. 540; *Newton* v. *Ontario Bank*, 13 Gr. 652; *Campbell* v. *Barrie*, 31 U. C. R. 279, at p. 291; *Larue* v. *Dohan* (1915) 48 Que. S. C. 374.

The Master or other officer of the Court to whom its powers are delegated is not a Court of competent jurisdiction within this section of the Act for the purpose of trying the question as to the propriety and value of any transfer of property: *Harte* v. *Ontario Express Co.; Molsons Bank Claim* (1894) 25 O. R. 247. Court of competent jurisdiction

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In such a case the liquidator should proceed under s. 34 of the Winding-up Act: *Re Sun Lithographing Co., Farquhar's Claim* (1892) 22 O. R. 57.

Under the Imperial Act an issue of debentures or debenture stock may be invalidated as a fraudulent preference: *Gaslight Co.* v. *Terrell,* L. R. 10 Eq. 168, but debentures issued *bonâ fide* to prevent winding-up were held not to be avoided: *Inns of Court Hotel,* L. R. 6 Eq. 90.

It has also been held by the English Courts that debenture holders are not as such entitled to attack a fraudulent preference on a winding-up on the ground that s. 164 of the Imperial Act is intended for the benefit of the general creditors: *Willmot* v. *London Celluloid Co.* (1887) 34 Ch. D. 147.

Payments by company within thirty days.

99. Every payment made within thirty days next before the commencement of the winding-up under this Act by a company unable to meet its engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, shall be void, and the amount paid may be recovered back by the liquidator by suit or action in any court of competent jurisdiction.

Restoration of security.

2. If any valuable security is given up in consideration of such payment, such security or the value thereof shall be restored to the creditor upon the return of such payment. R. S., c. 129, s. 72.

Compare section 134, Insolvent Act, 1875.

The payment must be by the debtor himself: *McWhirter* v. *Thorne,* 19 C. P. 302.

Fraudulent Payments.

Fraudulent payments.

"Valuable security" means some property of the debtor which has been given up to him or of which he has had the benefit; some security upon which the creditor, if still the holder of it, would be bound to place a value: *Beattie* v. *Wenger* (1897) 24 A. R. 72. See also *R.* v. *Brady,* 26 U. C. R. 13.

A payment by an insolvent after attachment against him on account of a draft discounted by defendants for him and dishonored by non-acceptance was recoverable back by the official assignee, though the defendants

were ignorant of the insolvency when they received the note from him: *Roe* v. *Royal Canadian Bank* (1868) 19 C. P. 347; followed in *Roe* v. *Bank of British North America* (1870) 20 C. P. 351. Sect. 99.

When a bank sold a stock of goods held by them and agreed to accept in payment cheques of a third party drawn on his deposit account and subsequently accepted, and for which cheques the purchaser gave his acceptance to the third party, it was held that an action would not lie by the liquidators of the bank against a third party to recover back the amount paid on his cheques as he had received no valuable consideration from the bank which he should be ordered to repay: *Exchange Bank of Canada* v. *Stinson* (1885) 8 O. R. 667.

The bank suspended payment September 15th, 1883; winding-up proceedings were commenced November 23rd; and an order made December 5th. The defendants C. & S., being depositors in the bank, drew a cheque for $4,000 on November 1st on their deposit account, which was given to D., a debtor of the bank, on notes maturing the following December and January. D. gave mortgage security to defendants for the cheque on October 31st. The arrangement was all made about October 5th, although the security was not given until the 31st and the cheque was not presented to the bank until November 23rd, when it was accepted as payment of the maturing notes. In an action by the liquidators of the bank against the defendants, to which D. was not a party, to recover the amount thus paid to defendants after the winding-up proceedings were commenced, and being an unjust preference, etc.:—

Held, that upon the facts there was no payment by the bank to the defendants, and that the transaction therefore was not within the statute, 45 Vict., c. 23, s. 75 (Dom.): *Exchange Bank of Canada* v. *Counsell* (1888) 8 O. R. 673.

Action by the assignee of B. & P. to recover back $190 paid by them to defendant within 30 days next before the assignment, they being then unable to meet their engagements in full, and defendant knowing such

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inability or having probable cause for believing it to exist. Plea on equitable grounds, that before the alleged payment B. & P., being retail merchants, requested defendant to lend to them for the purposes of carrying on their business, and he did lend, from time to time, various sums of money upon the express agreement that such monies should be repaid to defendant out of the proceeds of the general sales of goods thereafter made by B. & P., and that such proceeds should be held by B. & P. upon trust to repay and should be charged with and applied in repaying the defendant the amount lent by him; that at the time of the payments defendant was the creditor of B. & P. to an amount not less than $190 for monies advanced upon the said express agreement, and the monies paid to defendant by B. & P. were paid out of, and formed part of, the proceeds of said general sales, and were applied by defendant upon and on account of the money lent to defendant upon the said agreement and not otherwise:—

Held, on demurrer, Morrison, J., dissenting, plea good; for that the agreement between B. & P. and defendant gave defendant an equitable claim and mortgage on their goods which under the proviso to s. 90 of the Insolvent Act, 1869, was a "valuable security given up in consideration of such payment," and which must be restored to defendant before a return of the payment to him could be demanded. Morrison, J., was of opinion that the "valuable security" mentioned in s. 90 must be a security recognized in law which would have preference in the hands of a holder against any creditor, which the creditor when proving could show and describe and value, and capable when so valued of being assigned and delivered to the assignee for the estate, and that defendant's equitable claim here was not such a security: *Churcher* v. *Johnston* (1874) 34 U. C. R. 528. See *Re Wallis* (1874) 29 U. C. R. 313; *Re Lamb* (1866) 4 P. R. 16.

On November 15th, 1887, the day before the suspension of the Central Bank, one D., having sufficient funds to his credit, drew a cheque on it payable to C.,

who deposited the same in the Dominion Bank and obtained an advance upon it, and the Dominion Bank claimed upon it in the winding-up proceedings, having presented it for payment on November 17th, when, however, the Central Bank had suspended payment. On November 23rd, 1887, the Central Bank marked the cheque good, debiting D.'s account, and crediting the Dominion Bank with the amount thereof. Afterwards, however, the liquidators claiming the right to set off certain subsequently accruing liabilities of D. against the cheque, the Dominion Bank withdrew their claim upon it, and the Master in Ordinary disallowed it. Sect. 99.

Subsequently, and after the first dividend had been paid, C. heard of this and filed a claim on the cheque. The Master, however, held that the time for filing claims having elapsed, he had a discretion as to allowing the claim, and allowed it only subject to the said set off:—

Held, that there was no right to set off as claimed, and that the allowance of the claim was *ex debito justitiæ* and not discretionary. The fact of the Central Bank having accepted the cheque, and credited the amount to the Dominion Bank and charged the amount to D., showed conclusively that at that time the Central Bank was not a creditor of D.; nor did the case come within the meaning of any of the clauses in the Winding-up Act relating to Fraudulent Preferences: *Re Central Bank; Cayley's Case* (1889) 17 O. R. 122.

Where an officer of the company has transferred to the latter, in breach of trust, trust moneys which being subsequently used in the company's business are no longer capable of being ear marked and followed by the *cestuis que trust*, so that the company becomes merely a debtor to the trust estate for the moneys, the withdrawal and payment of the moneys to the trustee for the protection of the *cestuis que trust* on the eve of a winding-up is a payment to creditors and void under s. 99: *Trusts and Guarantee* v. *Munro* (1909) 19 O. L. R. 480. The view of the debtor in making the payment is immaterial, *ibid.*

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The repayment by a company on the eve of insolvency of advances made and which have benefited its creditors is not a preferential payment: *Larue* v. *Dohan* (1915) 48 Que. S. C. 375.

Debts of company transferred to contributories or persons indebted to the company.

100. When a debt due or owing by the company has been transferred within the time and under the circumstances in the last preceding section mentioned, or at any time afterwards, to a contributory, or to any person indebted or liable in any way to the company, who knows or has probable cause for believing the company to be unable to meet its engagements, or in contemplation of its insolvency under this Act, for the purpose of enabling such contributory, or such person so indebted or liable to the company, to set up, by way of compensation or set-off, the debt so transferred, such debt shall not be set up by way of compensation or set-off against the claim upon such contributory or person. R. S., c. 129, s. 73; 52 V., c. 32, s. 16.

Before the amending Act, 52 Vict. (Dom.) c. 32, s. 16, was passed it was held that the prohibition in s. 73 of the former Act against acquiring debts for the purpose of set-off was limited to the case of contributories, and that even in the case of a contributory who is also a debtor he may acquire a debt owing to the company and set it off against the debt due by him, for he is not a contributory *quoad* the debt: *Re Central Bank of Canada, Yorke's Case* (1888) 15 O. R. 625 (following *Ings* v. *Bank of Prince Edward Island* (1884-86) 11 S. C. R. 265. The provisions of the section as amended are now applicable to all persons indebted or liable in any way to the company.

Formerly claims acquired after a bank suspended payment but before the presentation of the petition could be set off: *Maritime Bank* v. *Robinson* (1866-7) 26 N. B. R. 297, but not claims acquired after the presentation of the winding-up petition, *ibid.* Now, after a bank has suspended payment and its insolvency is notorious, compensation of a debt due to the bank can not be effected by a transfer to the debtor of debts due by the bank to third parties, where such transfer has been made after the suspension and within thirty days prior to the winding-up proceedings: *Communauté* v. *Kent* (1904) Q. R. 13 S. C. 483.

Appeals.

Appeals in case of.

101. Except in the Northwest Territories, any person dissatisfied with an order or decision of the court or a single judge in any proceeding under this Act may,—

Future rights.

(*a*) if the question to be raised on the appeal involves future rights; or,

Principle.

(*b*) if the order or decision is likely to affect other cases of a similar nature in the winding-up proceedings; or,

Amount.

(*c*) if the amount involved in the appeal exceeds five hundred dollars;

by leave of a judge of the court, or by leave of the court or a judge of the court to which the appeal lies, appeal therefrom. R. S., c. 129, s. 74; 5 Geo. V. (1915), c. 21, s. 1.

Court.

102. Such appeal shall lie,—

Ontario.

(*a*) in Ontario, to the Court of Appeal for Ontario;

Quebec.

(*b*) in Quebec, to the Court of King's Bench;

Other places.

(*c*) in Manitoba, to the Court of Appeal for Manitoba; and

(*d*) in any of the other provinces, or the Yukon Territory, to a Superior Court *in banc*. R. S., c. 129, s. 74; 7-8 Ed. VII., c. 74.

Northwest Territories.

103. In the Northwest Territories, any person dissatisfied with an order or decision of the court or a single judge, in any proceeding under this Act may, by leave of a judge of the Supreme Court of Canada, appeal therefrom to the Supreme Court of Canada. R. S., c. 129, s. 74.

Practice.

104. All appeals shall be regulated, as far as possible, according to the practice in other cases of the court appealed to, but no appeal hereinbefore authorized shall be entertained unless the appellant has, within fourteen days from the rendering of the order or decision, or within such further time as the court or judge appealed from, or, in the Northwest Territories, a judge of the Supreme Court of Canada, allows, taken proceedings therein to perfect his appeal, nor unless, within the said time, he has made a deposit or given sufficient security, according to the practice of the court appealed to, that he will duly prosecute the said appeal and pay such damages and costs as may be awarded to the respondent. R. S., c. 129, s. 74.

Security.

Dismissing appeal.

105. If the party appellant does not proceed with his appeal, according to this Act and the rules of practice applicable, the court appealed to, on the application of the respondent, may dismiss the appeal with or without costs. R. S., c. 129, s. 75.

Appeal to Supreme Court of Canada.

106. An appeal, if the amount involved therein exceeds two thousand dollars, shall by leave of a judge of the Supreme Court of Canada, lie to that Court from,—

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(*a*) The Court of Appeal in the provinces of Ontario, Manitoba and British Columbia (9-10 Ed. VII. c. 62).

(*b*) the Court of King's Bench in Quebec; or,

(*c*) a superior court in banc, in any of the other provinces, or in the Yukon Territory. R. S., c. 129, s. 76.

Appeals.

The right of appeal exists only in cases falling within sec. 101, so no appeal lies from an order refusing to set aside an appointment for the examination of an officer of the petitioner: *Re Stevenson & Brodie, Ltd.* (1911) 18 O. W. R. 163; 2 O. W. N. 435.

Disputing validity of winding-up order.

If a winding-up order has not been appealed against, a contributory, or other person not a stranger to the winding-up proceedings, cannot call into question its validity on any of the proceedings in the winding-up. See *Re London Marine Association* (1870) L. R. 8 Eq. 176; *Re Arthur Average Association* (1876) 3 Ch. D. 522; *Ib.* (1875) 10 Ch. 542; *Re Haycock's Policy* (1876) 1 Ch. 611, 616, 617; *Re Padstow Association* (1882) 20 Ch. D. 137, at p. 145; *Strick* v. *Swansea Tin-Plate Co.* (1887) 36 Ch. D. 558; *Re Sunderland Building Society* (1888) 21 Q. B. D. 349; *Overend, Gurney & Co.* (1867) 16 L. T. 148. But a stranger to the winding-up may dispute the validity of the order: *Re Bowling's Contract* (1895) 1 Ch. 663.

Appeal against winding-up order.

After a winding-up order has been made and become effective the proper way to attack it is by appeal, not by application directed to the judge who made the order to rescind it: *Re Equitable Savings Association* (1903) 6 O. L. R. 26, 31. A judge has no power to rescind his winding-up order, at all events where he has no additional material before him, and it is not apparent that he was previously misled or that any fact was suppressed, *ibid.* But see *Siche Light Co.* v. *Fortin,* 13 Que. P. R. 235 (S. C.); also *Pontbriand Co.* v. *Cosky* (1912-3) 14 Que. P. R. 19. Nor has a judge on appeal from the findings of the Official Referee jurisdiction to review the winding-up order: *Re Farmer's Bank of Canada, Lindsay's Case* (1916) 28 D. L. R. 328; 35 O. L. R. 470.

Appeals—procedure.

With respect to appeals the procedure is governed by ss. 101-106 inclusive, but the appeals so provided

for relate, not to the direct appeal from the Master or Referee before whom the reference is proceeding, but to the appeal subsequently to be taken to the Court of Appeal. The first appeal from the Master or Referee who is conducting the reference exists as of right in Ontario, on the general principle that when the Court has delegated to a subordinate tribunal any of its powers, a right of appeal always exists from such tribunal to the Court itself in the Province of Ontario: *Markle* v. *Ross* (1889) 13 P. R. 135. The appeal from a local Master is to a single judge of the Supreme Court of Ontario. Sects 101-106.

'The matters in regard to which an appeal is contemplated are as to substantial matters of property or rights arising in the winding-up proceedings—an order having been granted and something having arisen affecting the assets and the creditors' rights therein,' per Boyd, C., in *Re Belding Lumber Co.* (1911) 23 O. L. R. 255, at p. 258. Cases in which leave may be given.

The original winding-up order is an order from which an appeal will lie under this section: *Re Union Fire Insurance Co.* (1886) 13 A. R. 268. Such an appeal involves future rights, *ibid.*, p. 295; *Marsden* v. *Minnekahda Land Co.* (1918) 40 D. L. R. 76; though it cannot be said that any sum of money is involved: *Cushing* v. *Cushing* (1906) 37 S. C. R. 427. See also *Re McGill Chair Co.* (1912) 5 D. L. R. 393. 101 (a) Future rights.

Where an order had been made on the petition of the company launched in pursuance of a resolution of the shareholders, and proceedings were pending to annul the resolution as being fraudulent and illegal, the order was quashed and the petition directed to be held in suspense pending the conclusion of the litigation: *Belanger* v. *Union Abitibi Mining Co.* (1917) 32 D. L. R. 700; 25 Que. K. B. 376.

An appeal may be taken from an order refusing to grant a winding-up order: *Marsden* v. *Minnekahda Land Co.* (1918) 40 D. L. R. 76, or from an order by a judge revoking his order for dissolution: *Re Equitable, &c., Association* (1903) 6 O. L. R. 26. An order granting leave to serve a misfeasance summons *ex*

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juris is not a matter affecting future rights, but is a mere matter of procedure: *Brown* v. *Cadwell* (1918) 2 W. W. R. 229.

Future rights.

The words "future rights" should be given a wide interpretation: *Re J. McCarthy & Sons* (1916-7) 38 O. L. R. 3, where Meredith, C. J. C. P., in the Appellate Division, dealing with an appeal involving leave to bring an action under s. 22 stated the following to be 'future rights' sufficient under this section, 'the right of trial by ordinary methods involving future possible trial by jury and future unrestricted rights to appeal to this Court and to the Supreme Court of Canada, and other such like rights of the ordinary litigant.' See also *Re Union Insurance Co.* (1886) 13 A. R. 268, 295; *Re Elliott & Sons, Ltd.* (1915-16) 9 O. W. N. 51.

101 (b) Principle.

Test cases brought by one or more contributories to obtain a decision on some question affecting a group or class furnish an example of the application of this sub-section: cf. *Re Monarch Bank of Canada* (1913) 32 O. L. R. 207; so also an appeal involving the question of liability on bonus stock, all the company's stock having been so issued: *Re McGill Chair Co.* (1912) 5 D. L. R. 393. See also *Re Bailey Cobalt* (1919) 17 O. W. N. 228.

101 (c) Amount.

In ascertaining the amount involved, which must exceed five hundred dollars, interest and costs are not to be included: *Dufresne* v. *Guevremont* (1896) 26 S. C. R. 216; *Wiarton Beet Root Sugar Co., Kydd's Case* (1905) 6 O. W. R. 590. Where the amount in question, while nominally just beyond five hundred dollars, was very uncertain, as the parties on whom the liability was imposed were said to be financially worthless, except in the case of one whose position was problematical, leave was refused: *Re McGill Chair Co.* (*Munro's Case*) and *Re Matthew Guy Carriage and Automobile Co.* (1912), 5 D. L. R. 393. See, however, *Re J. McCarthy & Sons* (1916-7) 38 O. L. R. 3, at p. 6, also *Brown* v. *Cadwell* (1918) 2 W. W. R. 229.

Other instances of circumstances in which leave to appeal will be granted are as follows:

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Other instances in which leave granted.

Re Central Bank of Canada (1897) 17 P. R. 370. There certain unclaimed moneys had been erroneously paid out of Court to certain parties. Subsequently the Receiver-General claimed the moneys under ss. 40 and 41 of the Winding-up Act (now ss. 44, 45, and 137), and presented a petition to the Court for repayment of such moneys, or in the alternative for leave to appeal from the orders directing payment out to the executors. This petition was dismissed on the ground that the petitioner was not entitled to complain even if the moneys had been improperly paid out. The Receiver-General applied for leave to appeal to the Court of Appeal, and it was held that a judge of the High Court had power to grant such leave.

An order of the County Court under the Ontario Winding-up Act approving of the sale of the assets is a final order as nothing further remains to be done under it, and therefore it is the subject of appeal: *Re D. A. Jones Co.* (1891-2) 19 A. R. 63.

It has been held that an appeal will lie from a ruling of the Master-in-Ordinary as to the proper disposition of moneys paid into Court by trustees of an estate, being the balance in the hands of liquidators of an insolvent bank after passing their final accounts, and which had been erroneously paid out to the trustees: *Hogaboom's Case,* 19 C. L. T. 66.

An order was made by Proudfoot, J., directing the winding-up under 45 Vict., c. 23 (Dom.), 1882, of a fire insurance company incorporated by the legislature of Ontario, and against which proceedings had previously been taken under R. S. O. c. 160, and the "Joint Stock Winding Up Act" (Ont.). The order appointed the receiver in the former proceedings interim liquidator, etc., and further referred it to the Master to appoint a liquidator, etc., and to settle the list of contributories; and further provided that certain accounts and inquiries which had been made under the previous proceedings, should be incorporated with and used in the winding-up proceedings under the Dominion statutes in so far as they could properly be made applicable. Held that this was an order from which an appeal would lie

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under s. 78 of the Act of 1882; *Re Union Fire Ins. Co.* (1886-7) 13 A. R. 268.

Cases in which no appeal lies.

Where the contest is really between solicitors of creditors competing for the carriage of the order, that is not a proper case for appellate interference: *Re Belding Lumber Co.* (1911) 23 O. L. R. 255, per Boyd, C.; so also where there is no question of some importance involved nor some doubt of the correctness of the judgment in review leave will not be granted: *Re Canadian Shipbuilding Co.* (1912) 4 O. W. N. 157; *Re Ontario Bank* (1917) 12 O. W. N. 245. See also *Re Durnford Elk Shoes, Ltd.* (1916-17) 11 O. W. N. 105.

When an order has been made giving leave to appeal such an order can not be appealed from, as it is not an order from which an appeal will lie. This is on the principle that wherever power is given to a legal authority to grant or refuse leave to appeal the decision of that authority is, from the very nature of the thing, final and conclusive without appeal unless an appeal from it is expressly given: *Re Central Bank of Canada* (1897) 17 P. R. 395. See also *Hogaboom's Case* (1897) 24 A. R. 470; *Re Sarnia Oil Co.* (1893) 15 P. R. 347.

This rule only applies where there is power to give such leave; and where no appeal lies the order must be ineffectual and the Appellate Court will, of its own motion, refuse to enter on the appeal: *Re J. McCarthy & Sons* (1916-7) 38 O. L. R. 3; 32 D. L. R. 441; also *Cushing Sulphite Fibre Co.* v. *Cushing* (1906) 37 S. C. R. 427. In the McCarthy Case the appeal was subsequently heard on the merits.

Practice.

Section 101 was amended in 1915 to the effect that leave may also be given by the Court or a judge of the Court to which the appeal lies. Before the amendment it was held that s. 104 indicated that leave should be obtained from the judge who made the order: *Re Belding Lumber Co., Ltd.* (1911) 23 O. L. R. 255. See also *Re Cushing Sulphite Fibre Co.* (1906-8) 38 N. B. R. 581. The exercise of discretion in granting or refusing leave by the judge having charge of the winding-up

proceedings may be reviewed on appeal, *ibid.*, but see *Re Central Bank of Canada* (1897) 17 P. R. 395, where it was held that an order granting leave to appeal is an order from which an appeal does not lie, and therefore no appeal from such an order will be granted.

Where an application for leave to appeal to the Court of Appeal from a decision in a matter under the Winding-up Act had been made under s. 74 of R. S. C. 129 (corresponding to s. 101 of c. 144 before the amendment) and refused by a judge, a fresh application would not be entertained by another judge. The cases in which successive applications to successive judges have been favored are not pertinent to a case where the right to appeal, upon leave, is sought under a special statute: *Re Sarnia Oil Co.* (1893) 15 P. R. 347.

A winding-up order under 45 Viet. c. 25 (Dom.), winding up a foreign company doing business in Ontario and made by one judge will not be set aside by another. An application for that purpose must be made to the proper Court: *In re Lake Superior Copper Co., Ltd., Re Plummer* (1885) 9 O. R. 277.

Where a proposed appeal is from a report of the Master an application for security for costs should be made to that Master and not to the Master-in-Chambers: *Bailey Cobalt Mines* v. *Benson* (1918) 43 O. L. R. 321.

Where notice of appeal to the Court of Appeal has been given without leave it is not necessary to have the notice set aside: *Re Sarnia Oil Co.* (1893) 15 P. R. 182; and where the appellant has sought to proceed without leave the case has been struck off the list: *Re Canadian Shipbuilding Co.* (1912) 4 O. W. N. 157.

Extension of time.

The time may be extended even where the application for extension is made after the fourteen days have elapsed: *Re Monarch Bank* (1910) 18 O. W. R. 743; 2 O. W. N. 738; *Calumet Metals, Ltd.* v. *Eldredge* (1914) 15 D. L. R. 461, where the authorities are collected. A respondent by demanding, or applying to increase the amount of, security for costs, thereby waives his right to object that security was not originally furnished in

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time: *In re Florida* (1896-1901) 8 B. C. R. 388; *In re The Oro Fino Mines, Ltd.* (1898-07) 7 B. C. R. 388. The section is also referred to in *Re Belding Lumber Co., Ltd.* (1911) 23 O. L. R. 255.

Appeal to Supreme Court of Canada.

There is an appeal to the Supreme Court of Canada, by leave of a judge thereof, only if the amount involved exceeds two thousand dollars. In other words, the appeal lies only where monetary questions are under consideration, *e.g.*, the liability of a contributory. So a judgment refusing to set aside a winding-up order does not involve any amount and leave to appeal to the Supreme Court of Canada can not be granted: *Cushing Sulphite Fibre Co.* v. *Cushing* (1906) 37 S. C. R. 427. Where the appeal involves the liability of several contributories, the fact that the aggregate amount for which these are sought to be made liable exceeds two thousand dollars will not give the Supreme Court jurisdiction. The appeal must be treated as if proceedings had been separately taken against each: *Stephens* v. *Gerth et al., In re Ontario Express* (1895) 24 S. C. R. 716.

The jurisdiction is dependent on the amount involved in the judgment appealed from and not on the amount demanded in the proceedings on which the judgment was rendered: *Re Great Northern Construction Co.* (1916) 53 S. C. R. 128, per Brodeur, J. Thus where a contributory by the judgment appealed from had been fixed on the list for an amount sufficient to give jurisdiction, but it was shown that a call of 50 per cent. only had been made on contributories and that no further calls were proposed to be made, so that less than $2,000 would be demanded from the contributory, Brodeur, J., held that the court had jurisdiction: *In re Monarch Bank of Canada, Murphy's Case,* June 17, 1919 (unreported).

In order to obtain leave to appeal under this section, it is not enough to show merely that the necessary amount is in controversy. If no important principle of law, nor the construction of a public act, nor any question of public interest is involved, leave to appeal to the Supreme Court of Canada will not be granted: *Riley* v. *Curtis's and Harvey* (1920) 59 S. C. R. 206.

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The appeal given by s. 106 must be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from, as provided by s. 69 of the Supreme Court Act, R. S. C. 1906, c. 139; and after the expiration of the sixty days neither the Supreme Court of Canada nor any judge thereof can grant leave to appeal: *Re Great Northern Construction Co.* (1916) 53 S. C. R. 128.

Within sixty days.

See also *Ontario Bank* v. *Chaplin* (1892) 20 S. C. R. 152.

An action by a beneficiary against a trust company executor of the testator and the trust company's liquidator under a winding-up order to recover the proceeds of life insurance policies collected by the executor and which had been bequeathed to the plaintiff, is not subject to the provisions of s. 106 and no leave to appeal is necessary: *Arnold* v. *Dominion Trust Co.* (1918) 56 S. C. R. 433, Idington and Brodeur, JJ., dissenting.

Procedure.

Describing liquidator

107. In all proceedings connected with the company, a liquidator shall be described as the liquidator of the (*name of company*), and not by his individual name only. R. S., c. 129, s. 29.

Compare Imperial Companies Act, 1862, s. 94. See *Bank of Hochelaga* v. *Masson* (1884) 1 M. L. R. 62.

Cf., the notes to s. 34 (a).

Similar to ordinary suit.

108. The proceedings under a winding-up order shall be carried on as nearly as may be in the same manner as an ordinary suit, action or proceeding within the jurisdiction of the court. 52 V., c. 32, s. 21.

This section indicates that s. 117 is not available for the use of a litigant: *Re Sovereign Bank of Canada* (1915) 34 O. L. R. 577.

Powers of court exercised by a single judge.

109. The powers conferred by this Act upon the court may, subject to the appeal in this Act provided for, be exercised by a single judge thereof; and such powers may be exercised in chambers, either during term or in vacation. R. S., c. 129, s. 77.

The effect of these sections is, generally speaking, to adopt for the purposes of the winding-up the pro-

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cedure of the courts of that province in which the winding-up is being conducted.

Procedure

In some provinces special rules have been passed applicable to a winding-up proceeding. No special rules have been passed in the Province of Ontario.

Where the reference has been carried into the Master's office, the Master is, under the terms of the order of reference, invested with all the powers to apply the Act that are conferred upon the Court and is enabled to exercise all those powers which could be exercised by a judge of the Court if the matter were being dealt with directly by him.

The proceedings before the Master are substantially analogous to the proceedings in an administration action, subject only to such variation and modification as the general requirements of the case may demand.

A corporation is a 'person': R. S. C. 1906 c. 1, s. 34 (No. 20); and in *Re Toronto Rowing Club* (1916) 37 O. L. R. 23; 31 D. L. R. 686, an order was made for production and inspection of all books and documents in the possession or control of a corporation to whom the lands of the insolvent company had been transferred.

In the Master's office formal pleadings are not commonly delivered, but where it appears that advantage would be gained by defining the issue beforehand the Master will direct pleadings to be delivered as in an ordinary action. He may also direct discovery and may order the parties to deliver affidavits upon production as in an ordinary action, and may also direct the examination of parties preliminary to the formal hearing of the matter. In this, as in all other respects, the procedure is entirely flexible and within the control of the Master before whom the evidence is conducted, and he may, to the extent which the particular circumstances of the case render it desirable, adopt any or all of the proceedings in the action as may appear conducive to the best results in the particular matter to be determined.

He should generally cause the proceedings to be so carried on as to lessen expense and expedite the winding-up.

Where an affidavit has been filed in opposition to a petition the deponent may be cross-examined thereon: *Manitoba Commission Co.* (1911-12) 22 Man. L. R. 268.

Nor has the Master power to set aside conveyances as against strangers to the winding-up. See section 133, *infra*.

The court has no power on a chamber application to determine the validity of instruments held by strangers to the company: *Re Maritime Trust Co., Ltd. & Burns* (1916) 26 D. L. R. 442.

Court may refer matters.

110. After a winding-up order is made the court may, subject to an appeal according to the practice of the court in like cases, from time to time as to the court may seem meet, by order of reference, refer and delegate, according to the practice and procedure of the court, to any officer of the court any of the powers conferred upon the court by this Act. 52 V., c. 32, s. 20.

The Master-in-Chambers or other subordinate judicial officer has no jurisdiction unless by delegation to make an order in a winding-up proceeding: *Re Sarnia Oil Co.* (1893) 15 P. R. 182.

'The powers to be delegated are confined to those conferred by the Act. The officer is not made the recipient of any of the original jurisdiction possessed by the court': *Re Cornwall Furniture Co.* (1909) 18 O. L. R. per Moss, C.J.O., at p. 103.

The power to fix the security to be given by the liquidator may be delegated under the section: *Shoolbred* v. *Clark* (1890) 17 S. C. R. 265, 272, 279; so also the power to settle the list of contributories: *Re Winding-up Act and Alberta Loan, &c., Co.* (1917) 32 D. L. R. 795. The delegated official has authority in settling the list to enquire whether shares in respect of which certificates for paid up stock have been issued have in fact had anything paid thereon: *Re Cornwall Furniture Co.* (1919) 18 O. L. R. 101. But in the absence of fraud the court will not enquire into the value of the consideration taken for the issue of paid-up shares, and the Master accordingly is incompetent to make such enquiry: *Re Hess* (1894) 23 S. C. R. 644, as explained in *Re Cornwall Furniture Co., supra*, by Moss, C.J.O., at

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Order of reference.

p. 105, who threw doubt on *Re Harris* (1905) 5 O. W. R. 649. However, see *Re Raven Lake, &c., Cement Co., National Trust* v. *Trusts & Guarantee* (1911) 24 O. L. R. 286.

The Master-in-Ordinary or other officer of the court to whom its powers are delegated, is not a court of competent jurisdiction within s. 98, for the purpose of trying the question of the propriety and value of a transfer of property alleged to be an unjust preference: *Hart* v. *Ontario Express, &c., Co., Molson's Bank Claim* (1894) 25 O. R. 247.

The referee to whom the winding-up is referred, subject to an appeal, is *functus officio* as to all matters dealt with by his report, and cannot directly or indirectly interfere with any appeal therefrom, *e.g.*, by directing the amendment of a notice of appeal from the report: *Re Anglo-American Fire Insurance Co.* (No. 1) (1919) 16 O. W. N. 149.

For the form of order of reference, see *Re Army & Navy Clothing Co.* (1902) 3 O. L. R. 37, 38.

Section 110 is *intra vires* of the Dominion Parliament: *Re Farmers' Bank of Canada, Lindsay's Case* (1916) 28 D. L. R. 328; 35 O. L. R. 470.

Service of process out of jurisdiction.

111. The court shall have the power and jurisdiction to cause or allow the service of process or proceedings under this Act to be made on persons out of the jurisdiction of the court, in the same manner, and with the like effect, as in ordinary actions or suits within the ordinary jurisdiction of the court. 52 V., c. 32, s. 19.

Order of court to be deemed judgment.

112. Every order of the court or judge for the payment of money or costs, charges or expenses made under this Act shall be deemed a judgment of the court, and may be enforced against the person or goods and chattels, lands and tenements of the person ordered to pay, in the manner in which judgments or decrees of any superior court obtained in any suit may bind lands or be enforced in the province where the court making the same is situate. 58-59 V., c. 18, s. 1.

Ordinary practice in case of discovery available.

113. The practice with respect to the discovery of assets of judgment debtors, from time to time in force in the superior courts or in any superior court in the province where any such order is made, shall be applicable to and may be availed of in like manner for the discovery of the assets of any person who

by such order is ordered to pay any money or costs, charges or expenses. 58-59 V., c. 18, s. 1.

Attachment and garnishment of debts.

114. Debts due to any person against whom such order for the payment of money, costs or expenses has been obtained, may, in any province where the attachment and garnishment of debts is allowed by law, be attached and garnisheed in the same manner as debts in such province due to a judgment debtor may be attached and garnisheed by a judgment creditor. R. S., c. 129, s. 79.

See *Imperial* v. *Provost* (1910) 11 Que. P. R. 150.

A garnishee order *nisi* issued by the Supreme Court of Ontario at the instance of the liquidator of an insolvent company is no answer to a workman's claim for judgment under the Master and Servant Act, R. S. Sask. 1909, c. 149, for wages earned in Saskatchewan: *Henderson* v. *C. P. R.* (1916) 30 D. L. R. 62.

Witnesses' attendance, how secured.

115. In any action, suit, proceeding or contestation under this Act, the court may order the issue of a writ of *subpœna ad testificandum* or of *subpœna duces tecum*, commanding the attendance, as a witness, of any person who is within Canada. R. S., c. 129, s. 80.

Arrest of absconding contributory or official and seizure of his goods, chattels and books.

116. The court may, at any time before or after it has made a winding-up order, upon proof being given that there is reasonable cause for believing that any contributory or any past or present director, manager, officer or employee of the company is about to quit Canada or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such person to be arrested, and his books, papers, moneys, securities for money, goods and chattels to be seized, and him and them to be safely kept until such time as the court orders. R. S., c. 129, s. 52.

Compare Imperial Companies Act, 1862, s. 118.

As to the requirements and form of the affidavit necessary to found an order for arrest under this section, see *Central Bank* v. *Earle* (1889) 28 N. B. R. 173, in which it was held that it must appear by the affidavit that the suit in question was brought by the direction of the liquidator, and by order of the Court under the Winding-up Act.

And see *In re Imperial Mercantile Credit Co.* (1867) L. R. 5 Eq. 264, and *Cotton Plantation Co. of Natal* (1868) W. N. 79.

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Examination of persons having effects of company, or information.

117. The court may, after it has made a winding-up order, summon before it or before any person named by it, any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the trade, dealings, estate or effects of the company. R. S., c. 129, s. 81.

Cf. Imperial Companies Act, 1862, s. 115; Companies (Consolidation) Act, 1908, s. 174.

The section 'confers a special power, of an inquisitorial character, intended to be used by the liquidator for his own guidance in the conduct of the liquidation': *Re Sovereign Bank of Canada* (1915) 34 O. L. R. 577, per Boyd, C., at p. 579. It is a proceeding not for the purpose of taking evidence, but of obtaining information. On this ground creditors were refused, under s. 115 of the Act of 1862, leave to attend at the examination to obtain information for the purpose of establishing a claim against the company: *In re Norwich Equitable, &c., Co.* (1884) 27 Ch. D. 515. The application when made by the liquidator is *ex parte* without affidavit, but where a contributory desires to put the section in force he must give notice to the liquidator; and semble the person summoned to be examined has no *locus standi* to appeal against the order directing his examination: *Re Gold Co.* (1879) 12 Ch. D. 77, 82, 83.

The issuing of a summons is a matter wholly in the discretion of the court: *In re Imperial Continental Water Corporation* (1886) 33 Ch. D. 314, 319.

Where the order to examine is made at the instance of a contributory, the latter may not take advantage of the section for the purpose of enforcing his own rights against the person examined, and thereby obtain a means of discovery greater than the law affords: *In re Imperial Continental Water Corporation* (1886) 33 Ch. D. 314. In certain circumstances, however, there may be a defined right of discovery open to a contributory, and in *Re Sovereign Bank of Canada, supra,* the court on the refusal of the liquidator to enter on the examination proposed by the contesting contributories, and the refusal of the Official Referee to allow the contribu-

tories to examine certain persons, directed that the Official Referee should consider the appellant's application to examine a former general manager of the insolvent bank in the view that the contributories might have a claim to invoke the aid of s. 117.

See also *Re Toronto Rowing Club* (1916) 37 O. L. R. 23; 31 D. L. R. 686.

Person summoned refusing to attend.

118. If any person so summoned, after being tendered a reasonable sum for his expenses, refuses, without a lawful excuse, to attend at the time appointed, the court may cause such person to be apprehended and brought up for examination. R. S., c. 129, s. 81.

Cf. Imperial Companies (Consolidation) Act, 1908, s. 174 (4).

Production of papers.

119. The court may require any such officer or person to produce before the court, any book, paper, deed, writing or other document in his custody or power relating to the company. R. S., c. 129, s. 81.

Cf. Imperial Companies (Consolidation) Act, 1908, s. 174 (3).

See *Re Toronto Rowing Club* (1916) 37 O. L. R. 23; 31 D. L. R. 686.

Lien on documents.

120. If any person claims any lien on papers, deeds, writings or documents produced by him, such production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding-up to determine all questions relating to such lien. R. S., c. 129, s. 81.

Cf. Imperial Companies Act, 1862, s. 115; Consolidation Act, 1908, s. 174 (3).

Production of documents 'without prejudice' to the lien does not, where the same is a 'passive' lien, in any wise affect it so as to entitle the claimant to priority over the claims of other creditors: *Executors and Administrators Trust Co.* v. *Seaborn* (1916) 27 D. L. R. 427.

Examination on oath.

121. The court or person so named may examine, upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought up in manner aforesaid, concerning the affairs, dealings, estate, or effects of the company, and may

Sect. 121. reduce to writing the answers of any such person, and require him to subscribe the same. R. S., c. 129, s. 82.

Cf. Imperial Companies (Consolidation) Act, 1908, s. 174 (2).

Inspection of books and papers.

122. After a winding-up order has been made, the court may make such order for the inspection, by the creditors, shareholders, members or contributories of the company, of its books and papers, as the court thinks just.

Limitation of inspection.

2. Any books and papers in the possession of the company may be inspected in conformity with the order of the court, but not further or otherwise. R. S., c. 129, s. 54.

Compare Imperial Companies Act, 1862, s. 156.

The liquidator is entitled to the custody of the books as against a mortgagee. Special circumstances must generally be shewn in order to obtain an order for inspection: *Ex p. Buchanan* (1866) 15 W. R. 99; *Re Imperial Land Co. of Marseilles* (1882) W. N. 173; *Colonial Engineering Co. & Dominion Light, Heat & Power Co.* (1911-2) 13 Que. P. R. 436. Where inspection is sought for some purpose other than that of the winding-up the order will be refused: *Re North Brazilian Sugar Factories* (1888) 37 Ch. D. 83. And see *Ex p. Walker* (1851) 15 Jur. 853; *Lancashire Cotton Spinning Co.* v. *Greatorex* (1866) 14 L. T. 290; *Re Emma Silver Mining Co.* (1875) L. R. 10 Ch. 194; *Re Lisbon Steam Tramways Co.* (1875) W. N. 54; *Re National Financial Co.* (1867) 15 W. R. 499.

Officer of company misapplying money.

123. When in the course of the winding-up of the business of a company under this Act, it appears that any past or present director, manager, liquidator, receiver, employee or officer of such company has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally liable, examine into the conduct of such director, manager, liquidator, receiver, officer or employee, and, upon such examination may make an order requiring him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest, at such rate as the court thinks just, or to contribute such sums of moneys to the assets of the company, by way of compensation in respect

Order compelling repayment.

of such misapplication, retention, misfeasance or breach of trust, as the court thinks fit. R. S., c. 129, s. 83. Sect. 123.

Imperial section.

The section reproduces s. 165 of the Imperial Companies Act, 1862. The corresponding section, 215 (1) of the Companies (Consolidation) Act, 1908, is somewhat wider in its terms, including 'any person who has taken part in the formation or promotion of the company,' receivers, employees and promoters. The more recent English cases must accordingly be applied with caution as regards the classes of persons liable under s. 123.

The principle of the Winding-up Act is that all claims which are capable of being satisfactorily dealt with in the winding-up should be so disposed of, and a shareholder will not be permitted to bring an action against the directors and officers for misfeasance: *Re Farmers' Loan & Savings Co., Ex p. Toogood* (1908) 8 O. W. R. 12. If, however, the cause of action against a director is a personal wrong, the right to sue the director persists, and no leave is necessary under s. 22, for the assets of the company would not be benefited or affected by the result of the litigation, *ibid.*

Effect of section.

The section creates no new right, its effect being merely to provide a summary procedure for enforcing against an officer of the company liability for breach of trust or other misconduct, which prior to the Act might have been enforced by action: *Irish Provident Assurance Co., Ltd.* (1913) 1 Ir. 352. 'The misfeasance section . . . is one which does not create liability but relates to procedure alone. . . . The liability must be found outside the section: *Re Owen Sound Lumber Co.* (1915) 34 O. L. R. 528, per Middleton, J. The summary procedure is in addition to other rights of action and if the liquidator prefers to obtain leave and bring an action he may do so: *Northern Trust* v. *Butchart* (1917) 35 D. L. R. 169.

Master's jurisdiction.

The Master has jurisdiction under the order of delegation to deal with questions of misfeasance: *Re Bolt & Iron Co., Livingstone's Case* (1887-9) 14 O. R. 211.

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affirmed (1889) 16 A. R. 397; *Re Owen Sound Lumber Co.* (1916-17) 38 O. L. R. 414, 420.

Misfeasance.

Misfeasance has been defined so as to include a breach of duty by an officer the direct consequence of which has been a misapplication of its assets resulting in pecuniary loss to the company for which he could be made responsible by an action at law or in equity: *In re Kingston Cotton Mill Co.* (No. 2) (1896) 2 Ch. 279, 283. And see *Coventry & Dixon's Case* (1880) 14 Ch. D. 660; *Cavendish Bentick* v. *Fenn* (1887) 12 App. Cas. 652.

Under the section three questions are involved: (1) Has the person sought to be charged been guilty in relation to the company of one or more of the acts specified in the section? (2) If so, has loss resulted to the company or its assets for which compensation ought to be directed to be made? and (3) what is the extent of the compensation which ought to be directed?: *In re Manes Tailoring Co., Crawford's Case* (1909) 18 O. L. R. 572, per Moss, C.J.O., at p. 580.

Pecuniary loss to the company.

In order to bring a case within the section, it must be shown that pecuniary loss to the company resulted from the act or default complained of: *In re New Mashonaland Co.* (1892) 3 Ch. 577; *Irish Provident Insurance Co., Ltd.* (1913) 1 Ir. 352. Loss to the company is an essential ingredient of the offence: *Re Dominion Trust Co.* (*Directors' Case*) (1917) 32 D. L. R. 63; *Re Stewart, Howe & Meek* (1913) 9 D. L. R. 484.

A director may be liable even though he may only have been guilty of a mistake of law and not of any moral wrongdoing: *In re Manes Tailoring Co., Ltd.* (1909) 18 O. L. R. 572. It has been held, however, that a *bona fide* transaction with the company impracticable only on the ground of *ultra vires* will be set aside only subject to the terms that both parties are restored to their original rights: *Irish Provident Insurance Co., Ltd.* (1913) 1 Ir. 352. If the act of misfeasance is neither *ultra vires* nor fraudulent, nor dishonest, it must be shown that the directors did not really exercise their discretion or judgment as such: *In re Mashonaland Co.* (1892) 3 Ch. 577. Directors who have

taken no active part in the management of the company's business, who have attended no meetings and are not cognizant of any of the acts or omissions of the board are not liable: *Re Dominion Trust Co.* (*Directors' Case*) (1917) 32 D. L. R. 63. Sect. 123.

The duties and responsibilities of directors have been considered generally under s. 80 of the Companies Act, which see. See also for liability in respect of improper dividends, ss. 70 and 82 of the Companies Act; in respect of permitting the transfer of unpaid shares, s. 83, and unauthorized remuneration of directors, s. 80 of the Companies Act.

Directors who knowingly or without the exercise of ordinary prudence, sanction the payment of a dividend in diminution of capital are jointly and severally liable: *Northern Trust Co.* v. *Butchart* (1917) 35 D. L. R. 169; but negligence must be so gross as to amount to a breach of trust: *ibid.* p. 183. Where, however, directors in declaring dividends in diminution of capital have acted honestly and have not been guilty of wilful blindness or carelessness, they have been excused: *Re Owen Sound Lumber Co.* (1916-17) 38 O. L. R. 414. Dividends.

Where directors have no power to authorize payment of commissions out of the company's funds to persons who have procured subscriptions for the company's shares, they are liable on a misfeasance summons to repay to the liquidator the sums so improperly expended under their authority: *Re Monarch Bank of Canada* (1910) 22 O. L. R. 516; so also where the directors knowingly or without the exercise of ordinary prudence, sanction an illegal remuneration of directors or any *ultra vires* or illegal payments: *Northern Trust Co.* v. *Butchart* (1917) 35 D. L. R. 169. Commissions.

Moneys taken by directors in payment of services where such payment is not authorized are taken in breach of trust and are recoverable: *Re Bolt & Iron Co., Livingstone's Case* (1887-9) 14 O. R. 211, affirmed (1889) 16 A. R. 397. Likewise a commission on shares subscribed for in the memorandum of association by the director in question where the commission was not authorized by the articles or referred to in the prospectus Remuneration.

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Misfeasance.

and was therefore illegal under the governing Companies Act: *Re Canadian Diamond Co.* (1913) 11 D. L. R. 252. In *Re Owen Sound Lumber Co.* (1916-7) 38 O. L. R. 414, a director was held liable to refund moneys paid to him for guaranteeing the company's indebtedness in pursuance of a resolution of the directors invalid for lack of confirmation by the shareholders.

Where directors of a company had obtained money on the representation that the funds would be invested on mortgage, whereas they were in fact used to discharge pressing claims of the company's creditors, all the directors who stood by in circumstances which should have aroused their suspicions were held personally liable on a misfeasance summons for the amount so misapplied, the sum being directed to be paid to the liquidator for repayment to the person defrauded: *Re Traders' Trust Co. & Kory* (1916) 26 D. L. R. 41.

Promoters.

Where promoters by reason of being officers of the company are within the section their liability for undisclosed profits may be enforced by misfeasance summons; cf. *Leeds & Hanley Theatres of Varieties* (1902) 2 Ch. 809, and see the note on Promoters at pp. 204 ff., *supra*.

A director who had joined in sanctioning the issue to himself of shares as paid-up which were, in fact, not fully paid and had transferred his shares, receiving $125 more than he had paid, and the shares were subsequently forfeited for non-payment of calls, was held liable for breach of trust in assuming to accept the shares as paid-up, but the measure of damages was held to be the market value of the shares at the date of allotment. The shares not then being of any market value, his profit, the sum of $125, was the extent of his liability: *In re Manes Tailoring Co., Ltd.* (1909) 18 O. L. R. 572. The same rule was applied where a promoter had distributed among directors a portion of a block of shares issued to him as fully paid but without consideration on a sale by him to the company, and the value of the shares being shown to be nil the directors, though liable as contributories on any shares in their hands, were held not liable under the

section where they had sold their shares under circumstances not involving a violation of duty: *Re Owen Sound Lumber Co.* (1916-7) 38 O. L. R. 414. In the latter instance the directors would remain liable: *Re Peterborough Cold Storage* (1907) 14 O. L. R. 475.

Where directors adopt a system of doing business which disregards a provision of the governing statute, *e.g.*, a requirement that corporate and trust moneys are to be kept separate, that is *prima facie* a defective and negligent system and if loss can be shown to have resulted therefrom they will be guilty of misfeasance: *Re Dominion Trust Co.* (*Directors' Case*) (1917) 32 D. L. R. 63, 65.

No liability.

Neglect or omission to attend meetings is not the same as neglect or omission of a duty which ought to be performed thereat: *Marquis of Bute's Case* (1892) 2 Ch. 100. Merely voting in favor of a resolution authorizing payment to a co-director which fails to have any binding effect because not confirmed by the shareholders, is not misfeasance: *Re Owen Sound Lumber Co.* (1916-7) 38 O. L. R. 414. Where an illegal payment of money has been authorized by an *ultra vires* resolution mere concurrence in the resolution is not sufficient to impose liability where the director has not taken part in the payment: *Cullerne* v. *London, &c., Permanent Building Society* (1890) 25 Q. B. D. 485; *Young* v. *Naval, &c., Society* (1905) 1 K. B. 687, and see *Re Monarch Bank of Canada* (1910) 22 O. L. R. 516.

Acceptance of paid-up shares of a company for pre-incorporation services where the memorandum of association authorized the issue, though the prospectus in effect stated that the power to make such issue would not be exercised, and there was no claim of fraud as to the rendering or value of the services and no allegation of loss to the company, was held not to be misfeasance: *Re Canadian Diamond Co.* (1913) 11 D. L. R. 252.

Acting as a director without qualification is not misfeasance, no loss being shown: *Coventry & Dixon's Case* (1880) 14 Ch. D. 660.

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Who are liable.

It is not necessary that a director to be liable under the section be validly appointed; *de facto* directors will be liable: *Coventry & Dixon's Case* (1880) 14 Ch. D. 660; *Owen Sound Lumber Co.* (1916-07) 38 O. L. R. 414; *Northern Trust Co.* v. *Butchart* (1917) 35 D. L. R. 169, 180. Provisional directors are covered by the section: *Re Monarch Bank of Canada* (1910) 22 O. L. R. 516, but not a trustee for bondholders: *Astley* v. *New Tivoli* (1899) 1 Ch. 151, 154 (per North, J.); nor the company's solicitors: *Carter's Case* (1886) 31 Ch. D. 496.

Set-off.

There is no right of set-off against a claim made by the liquidator: *Ex p. Pelly* (1882) 21 Ch. D. 492; *Re Bolt and Iron Co., Livingstone's Case* (1887-9) 14 O. R. 21, affirmed (1889) 16 A. R. 397.

Limitation.

As to the operation of the Statute of Limitations, see *Flitcroft's Case* (1882) 21 Ch. D. 519; *Masonic, &c., Co.* v. *Sharpe* (1892) 1 Ch. 154; *National, &c., Co.* (1902) 2 Ch. 34; *North American Land, &c., Co.* v. *Watkins* (1904) 1 Ch. 242, affirmed (1904) 2 Ch. 233.

Interest.

In *National Bank of Wales* (1899) 2 Ch. 629 the rate allowed was five per cent., though the director eventually escaped liability in the House of Lords.

Procedure.

The application, which may be made by any liquidator, creditor or contributory is *ex parte* when made by the liquidator, and on notice to the liquidator if made by a creditor or contributory. *Semble,* if the application is by a contributory he must have a direct pecuniary interest in the success of the application: *Cavendish Bentick* v. *Fenn* (1887) 12 App. Cas. 652. The procedure authorized by the section is an independent and principal one and cannot be taken incidentally by the liquidator counterclaiming for damages against a director by way of contestation of the latter's claim against the company as a creditor: *Re Boston Shoe Co.* (1914) 16 D. L. R. 856.

Costs.

If the liquidator is unsuccessful the costs are usually given out of the estate, but the liquidator may be compelled by the order to pay the costs out of his own

pocket: *In re W. Powell & Sons* (1896) 1 Ch. 681. Costs may be imposed against the defendants even though they succeed in showing that their misconduct has caused the company no pecuniary loss so that the liquidator's claim fails: *In re David Ireland & Co.* (1905) 1 Ir. 133. Sect. 123.

124. The court may, by any order made after the winding-up order and the appointment of a liquidator, dispense with notice to creditors, contributories, shareholders or members of the company required by this Act, where in its discretion such notice may properly be dispensed with. 52 V., c. 32, s. 11. Dispensing with notice.

125. The courts of the various provinces, and the judges of the said courts respectively, shall be auxiliary to one another for the purposes of this Act; and the winding-up of the business of the company or any matter or proceeding relating thereto may be transferred from one court to another with the concurrence, or by the order or orders of the two courts, or by an order of the Supreme Court of Canada. R. S., c. 129, s. 84. Courts and judges. auxiliary. Transfer from one court to another.

The Court which has made the winding-up order is a Dominion Court *ad hoc* and can restrain by injunction proceedings against the liquidator in the Courts of other provinces: *Baxter* v. *Central Bank* (1891) 20 O. R. 214. Generally speaking a provincial Court should not act except at the request of the Dominion Court, but if requested should in every way assist such Court: *Mowat* v. *Dominion Trust Co.* (1914-15) 8 Sask. L. R. 404. As to transfer of a proceeding from one Court to another, see *Stewart* v. *Lepage* (1916) 53 S. C. R. 337, 349.

The section does not authorize the Courts of one province to entertain an application for leave to proceed with an action there commenced after a winding-up order has been made in another province. The application should be made in the winding-up proceedings to the Court which made the order: *Brewster* v. *Canada Iron* (1914-5) 7 O. W. N. 128. See also *Re Dominion Cold Storage Co.* (1898) 18 P. R. 68.

On an application in Saskatchewan for leave to proceed there against the defendant company and its liquidators for an order requiring the latter to account for property in their hands locally situate in Saskatchewan, the Court in British Columbia having made

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the winding-up order, it was held that the provincial Court should not intervene except on the ground of emergency which was not made out on the application: *Mowat* v. *Dominion Trust Co.* (1914-15) 8 Sask. L. R. 404.

Courts and judges auxiliary

Before an action against the company was commenced in Alberta a winding-up order had been made by the Supreme Court of British Columbia where the company was domiciled. It was held in view of s. 22 that the Courts of other provinces could not exercise the jurisdiction which they would otherwise possess without leave of the Court administering the provisions of the Act; but the proceedings taken were only irregular, and not void, and the Alberta Court would act as ancillary to the British Columbia Court should the latter desire the action to proceed. The action was stayed in the meantime: *Blais* v. *Bankers' Trust Corporation* (1913) 25 W. L. R. 653. See also *Stewart* v. *Lepage* (1916) 53 S. C. R. 337.

As to the extra-territorial jurisdiction of the Court of a province under the Winding-up Act see *Henderson* v. *C. P. R.* (1916) 30 D. L. R. 62.

Order of one court may be enforced by another.

126. When an order made by one court is required to be enforced by another court, an office copy of the order so made, certified by the clerk or other proper officer of the court which made the same, under the seal of such court, shall be produced to the proper officer of the court required to enforce the same. R. S., s. 129, s. 85.

Proceeding on order of another court.

127. Such last mentioned court shall, upon such production of the said certified copy of such order, take the same proceedings thereon for enforcing the order as if it was the order of the court required to enforce it. R. S., c. 129, s. 85.

The practice in Ontario is that on production of an office copy of the order certified as required by s. 126 execution may be issued on the order of the Court of another province without making such order a rule of Court or obtaining the direction of a judge: *Re Dominion Cold Storage Co., Lowerey's Case* (1898) 18 P. R. 68.

In New Brunswick the practice is on production of the order to the Registrar to enter the order as a judg-

ment of the Court under the rules made under the Act by the New Brunswick Court in Trinity Term, 1888, without any formal motion to that effect: *Re Sovereign Bank* (1915) 43 N. B. R. 519. Sect. 127.

128. The rules of procedure, for the time being, as to amendments of pleadings and proceedings in the court, shall apply, as far as practicable, to all pleadings and proceedings under this Act. Rules as to amendments.

2. Any court before which such proceedings are being carried on shall have full power and authority to apply to such proceedings the appropriate rules of such court as to amendments. R. S., c. 129, s. 86. Authority to apply.

129. No pleading or proceeding shall be void by reason of any irregularity or default which may be amended or disregarded; but the same may be dealt with according to the rules and practice of the court in cases of irregularity or default. R. S., c. 129, s. 87. Irregularity or default.

See the notes to s. 108.

As to amending the winding-up petition see the notes to s. 12. Where the liquidator incorrectly has brought an action in his own name, instead of in that of the company, leave may be given to amend. See *Kent* v. *Communauté* (1903) A. C. 220.

130. Any powers by this Act conferred on the court are in addition to, and not in restriction of any other powers at law or in equity of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company, or his estate, for the recovery of any call or other sum due from such contributory, debtor, or estate; and such proceedings may be instituted accordingly. R. S., c. 129, s. 90. Powers conferred by this Act are supplementary.

131. The court may, as to all matters relating to the winding-up, have regard, so far as it deems just, to the wishes of the creditors, contributories, shareholders or members, as proved to it by any sufficient evidence. R. S., c. 129, s. 19. Wishes of creditors.

131A. The court if satisfied that, with respect to the whole or any portion of the proceedings, the interests of creditors, claimants or shareholders can be classified, may, after notice by advertisement or otherwise, nominate and appoint a solicitor and counsel to represent each or any class for the purpose of the proceedings, and all the persons composing any such class shall be bound by the acts of the solicitor and counsel so appointed, Solicitors and counsel representing classes of creditors.

Sect. 131A. and service upon such solicitor of notices, orders, or other proceedings of which service is required, shall for all purposes be, and be deemed to be, good and sufficient service thereof upon all the persons composing the class represented by him; and the court may, by the order appointing a solicitor and counsel for any class, or by subsequent order, provide for the payment of the costs of such solicitor and counsel by the liquidator of the company out of the assets of the company, or out of such portion thereof as to the court seems just and proper. 6-7 Ed. VII. (1907), c. 51,.

No meeting is required under this section: *Re London Fence, Ltd. (No. 1)* (1911) 21 Man. 91.

Liquidator subject to summary jurisdiction of court.

132. The liquidator shall be subject to the summary jurisdiction of the court in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction; and the performance of his duties may be compelled by order of the court. R. S., c. 129, s. 30.

See the notes to s. 33.

Remedies obtained by summary order.

133. All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever. R. S., c. 129, s. 39.

Compare Insolvent Act, 1869, s. 50; Insolvent Act, 1875, s. 125.

The section lays down the general rule that the liquidator and the estate are to be protected from vexatious litigation and that claims against the estate must in general be disposed of in the winding-up and not otherwise. See *Re J. McCarthy & Sons* (1916-7) 38 O. L. R. 3; 32 D. L. R. 441; *Re Ontario Bank* (1916-17) 38 O. L. R. 242.

Who are affected.

The words 'all remedies sought, etc.,' apply to creditors who have proved or can prove: *Archibald* v. *Haldon,* 30 U. C. Q. B. 30, 36. Nor need the claimant be a creditor in the strict sense; proceedings by *cestuis que trust* are covered by the section: *Stewart* v. *Lepage* (1916) 53 S. C. R. 337, Davies, J., dissenting; but the section does not apply to a creditor who is not seeking

to enforce his claim, *e.g.*, a mortgagee who prefers to stand outside the liquidation: *Re Kurtz & McLean, Ltd.* (1908) 11 O. W. R. 437, 439. It was held, however, under s. 50 of the Insolvent Act, 1869, that where a mortgagee desired to obtain possession of assets in the hands of the liquidator he must proceed by summary application: *Crombie* v. *Jackson*, 34 U. C. Q. B. 575. A lienholder may obtain leave to pursue his remedies by application under this section: *Good* v. *Nepisiguit Lumber Co.* (1911-13) 41 N. B. R. 57, 74. Sect. 133.

A suit can not be entered against the liquidator without leave of the Court: *Robillard* v. *Blanchet* (1901) Q. R. 19 S. C. 383. Where a trust company is in process of liquidation under order of the Court in one province this section and section 22 will prevent a suit being brought in another province to have the liquidator declared a trustee of moneys deposited with the company for investment and for his removal and the substitution of a new trustee and the vesting in the latter of the securities representing the moneys deposited: *Stewart* v. *Lepage* (1916) 53 S. C. R. 337. The proper procedure in such a case is an application by summary petition, *ibid.*, per Idington and Anglin, JJ. So also where the plaintiff claimed the right to sue the liquidator for the price of goods alleged to have been taken and sold by the latter, whereby the plaintiff was deprived of his right of stoppage in transitu, it was held that an action having been begun without leave was barred by s. 133: *H. J. Carson & Co.* v. *The Montreal Trust Co.* (1915) 49 N. S. R. 50. Where, however, the plaintiffs, trustees for bondholders, had obtained leave to bring an action against the defendants, liquidators of the mortgagor company, in respect of assets alleged to be mortgaged under the trust deed, claiming (1) the proceeds, or (2) damages for conversion, it was held that the language of s. 133 was not applicable to the first claim and that its applicability to the second was doubtful: *Re Raven Lake Portland Cement Co., National Trust* v. *Trusts and Guarantee* (1911) 24 O. L. R. 286. As regards land mortgages it has been held that the section is applicable to the case of a single Effect of section.

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Summary proceeding.

mortgage only, and not where there are subsequent mortgages: *Re Canada Cabinet Co.* (1907) 9 O. W. R. 818.

Special circumstances and very substantial reasons are required to justify the granting of leave under s. 22 and if such leave has been granted on a wrong principle the plaintiff may be remitted by the Appellate Court to his rights under s. 133: *Re J. McCarthy & Sons* (1916-7) 38 O. L. R. 3; 32 D. L. R. 441.

Is the remedy exclusive?

It has been held by the Ontario Court of Appeal that the remedy by way of summary petition given by s. 133 is not exclusive; that s. 133 must be read with s. 22, the former section laying down the general rule, the latter (providing for leave to bring actions) giving the exception; that s. 22 is to be followed only where there are no exceptional circumstances; that s. 133 only applies to cases reasonably within its language. It was pointed out that some matters are beyond the jurisdiction of the Master or Referee in a winding-up proceeding, e.g., he can not make a vendor account for a profit which has accrued to him: *In re Hess* (1895) 23 S. C. R. 644, 665, 666, and he is not a court of competent jurisdiction within the meaning of s. 98 to try the question of a transfer alleged to be an unjust preference: *Hart* v. *Ontario Express* (1898) 25 O. R. 247. It was held that if the Referee had jurisdiction to adjudicate on the claims in the winding-up, he had a discretion under s. 22 to give leave to bring an action and that it could not be said that the discretion had been improperly exercised: *Re Raven Lake Portland Cement Co., National Trust* v. *Trusts and Guarantee* (1911) 24 O. L. R. 286.

So also in *Kurtz & McLean, Ltd.* (1908) 11 O. W. R. 437, where in addition to the claims of the applicant (an unpaid vendor) and the liquidator, a mortgagee claimed an interest in the assets in question, Mulock, C.J.K.B., ordered that if the mortgagee was willing to attorn to the jurisdiction (which he could not be compelled to do) then the rights of the three parties should be disposed of under the Act, but that otherwise the applicant should be entitled to bring an action.

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On the other hand in Nova Scotia in a case heard before the full Court it was said that, apart from the prohibition of s. 133 against proceeding by action, where the section applies the remedy is exclusive, the general rule being that where a new statutory remedy is provided it is the exclusive remedy: *H. J. Carson & Co.* v. *The Montreal Trust Company* (1915) 49 N. S. R. 50. In *Stewart* v. *Lepage* (1916) 53 S. C. R. 337, Anglin, J., at p. 348, regarded the petition under s. 133 as the exclusive means of obtaining relief so far as the claimants sought a declaration of trust and allocation to the trust of assets in the hands of the liquidator. Idington, J., stated at p. 345 that if the claim was not of a clear and undoubted character the Court might permit some more suitable remedy. Brodeur, J., was apparently of the opinion that if leave had been obtained the action might have been brought. Duff, J., gave no reasons. Davies, J., dissented. It may be pointed out that both of the last mentioned cases were instances of actions brought without leave; but in *H. J. Carson & Co.* v. *The Montreal Trust Co.* the Court held in effect that s. 133, which prohibited actions against the *liquidator*, and not s. 22, which prohibited actions against the *company*, governed. The judgment of Anglin, J., in *Stewart* v. *Lepage* looks in the same direction.

The question whether the remedy under s. 133 is exclusive was recently considered by the Court of Appeal in British Columbia in *Michigan Trust Co.* v. *Canadian Puget Sound Lumber Co.* (1918) 3 W. W. R. 273. The plaintiff trustee for bondholders under a mortgage trust deed was held entitled to a final order of foreclosure, leave to bring the action having been given. Macdonald, C.J.A., held that the contention that the remedy under s. 133 was exclusive could only prevail, if at all, when the case falls strictly within the class of cases mentioned in the section; and that the case did not fall within the section because the mortgaged premises were never "in the hands, possession or control of the liquidator." McPhillips, J.A., held that *Stewart* v. *Lepage* should not be interpreted as

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holding that, even where leave has been granted, such an action is not maintainable. Galliher, J. A., concurred in upholding the right of action.

Rules, Regulations and Forms.

Judges may make.

134. A majority of the judges of the court, of which the chief justice shall be one, may, from time to time make and frame and settle the forms, rules and regulations to be followed and observed in proceedings under this Act, and make rules as to the costs, fees and charges which shall or may be had, taken or paid in all such cases by or to attorneys, solicitors or counsel, and by or to officers of courts, whether for the officers or for the Crown, and by or to sheriffs, or other persons, or for any service performed or work done under this Act: Provided that in Ontario the judges of the Supreme Court of Ontario, and in Quebec, the judges of the Court of King's Bench, or a majority of such judges of which the chief justice shall be one, shall make and settle such forms, rules and regulations. R. S., c. 129, s. 92, as amended by 6 & 7 Geo. V. (1916), c. 5, s. 2.

Proviso.

Until rules are made, procedure of court to apply.

135. Until such forms, rules and regulations are made, the various forms and procedures, including the tariff of costs, fees and charges in cases under this Act, shall, unless otherwise specially provided, be the same as nearly as may be as those of the court in other cases. R. S., c. 129, s. 93.

Until rules are made under s. 134 the general rules of practice in force in the Court administering the Act are incorporated by reference in s. 135: *Re Belding Lumber Co.* (1911) 23 O. L. R. 255. Section 135 read with s. 2 (e) and s. 134 renders applicable in Ontario the procedure, including therein the rules and methods of practice current in the Supreme Court of Ontario which are to be adapted as nearly as may be to the uses of the profession under the Winding-up Act: *Re Baynes Carriage Co.* (1912) 7 D. L. R. 257, (1913) 27 O. L. R. 144. So, where the practice of the Court is to support petitions by affidavits and *viva voce* evidence shareholders petitioning for a winding-up were held entitled to examine the company's directors as witnesses in support of the petition, *ibid.*

As regards sales the ordinary practice of the Court will apply until rules are made under s. 134: *Re Bolt & Iron Co.* (1885) 10 P. R. 437.

Unclaimed Deposits. Sect. 136.

136. All dividends deposited in a bank and remaining unclaimed at the time of the final winding-up of the business of the company shall be left for three years in the bank where they are deposited, subject to the claim of the persons entitled thereto. Unclaimed dividends to remain in bank.

2. If such dividends are unclaimed at the expiration of three years aforesaid they shall be paid over by such bank, with interest accrued thereon, to the Minister. And paid to Minister after three years.

3. If such dividends are afterwards duly claimed they shall, with such interest, be paid over to the persons entitled thereto. R. S., c. 129, s. 94. If afterwards claimed.

When the liquidators had passed their final accounts and paid into Court the balance in their hands and that balance had by an inadvertence been paid out of Court to parties not entitled to it, it was held that the Receiver-General had such an interest in the fund that he might even before three years from the time of payment in had expired apply to the Court for an order for repayment into Court of the fund: *Hogaboom's Case* (1897) 24 A. R. 470; 28 S. C. R. 192.

Where a company had been struck off the register and dissolved under s. 24 of the Alberta Companies Ordinance it was held by the Alberta Supreme Court, Appellate Division, that the shareholders had a right to bring in their own name a representative action to recover assets belonging to the company, and that these assets did not vest in the Crown as *bona vacantia*: *Embree* v. *Millar* (1917) 33 D. L. R. 331.

137. The money deposited in the bank by the liquidator after the final winding-up of the business of a company shall be left for three years in the bank, subject to be claimed by the persons entitled thereto, and if not then paid out to such persons, shall be then paid over, with the interest accrued thereon, to the Minister, and if afterwards claimed shall be paid, with such interest, to the persons entitled to the same. R. S., c. 129, s. 41. Money deposited not paid after three years to be paid to Minister of Finance.

Offences and Penalties.

138. When a winding-up order is made, if it appears in the course of such winding-up that any past or present director, manager, officer or member of the company is guilty of an offence in relation to the company for which he is criminally Court may direct criminal proceedings.

Sect. 138. liable, the court may, on the application of any person interested in such winding-up, or of its own motion, direct the liquidator to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company. R. S., c. 129, s. 96.

Destruction of books or false entry therein.

139. Every person who, with intent to defraud or deceive any person, destroys, mutilates, alters or falsifies any book, paper, writing or security, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or other document belonging to the company, the business of which is being wound up under this Act, is guilty of an indictable offence and liable to imprisonment in the penitentiary for any term not less than two years, or to imprisonment in any gaol or in any place of confinement other than a penitentiary for any term less than two years, with or without hard labor. R. S., c. 129, s. 95.

Penalty.

See also s. 415 of Criminal Code (1906), which renders an officer or employee of the company guilty of such an offence liable to seven years' imprisonment.

Failure to comply with order of court. a contempt.

140. Any liquidator, director, manager, receiver, officer or employee of a company, failing to comply with the requirements or directions of any order made by the court under this Act, shall be guilty of contempt of court and shall be subject to all process and punishments of such court for contempt.

Removal of liquidator from office.

2. Any liquidator so failing may in the discretion of the court be removed from office as such liquidator. R. S., c. 129, ss. 38, 39, 40 and 83.

Refusal by officers of company to give information.

141. Any refusal on the part of the president, directors, officers or employees of a company to give all information possessed by them respectively as to the affairs of the company required by the accountant or other person ordered by the court under this Part to inquire into the affairs of the company and to report thereon, shall be a contempt of court, and such president, directors, officers or employees shall be subject to all process and punishments of such court for contempt. R. S., c. 129, s. 11.

Penalty.

Failure to deposit in bank money of estate.

142. Every liquidator who shall not within three days after the date of the final winding-up of the business of the company, deposit in the bank appointed or designated as hereinbefore provided, any money belonging to the estate of which he is such liquidator, then in his hands and not required for any other purpose authorized by this Act, with an account of such money, and a sworn statement that the same is all that he has in his hands, shall incur a penalty not exceeding ten dollars, and not less than ten per centum per annum interest upon the sums in

Penalty.

his hands for every day after the expiration of the said three days on which he neglects or delays such payment. R. S., c. 129, s. 40. Sect. 142.

143. Every person being brought up for examination before the court after the court has made a winding-up order, or appearing before the court for such examination, who refuses without lawful excuse to answer any question put to him or to subscribe any answer made by him on such examination, shall be guilty of contempt of court, and shall be subject to all process and punishments of such court for contempt. R. S., c. 129, s. 82. Refusal of witness to answer or subscribe is a contempt.

Evidence.

144. If the business of a company is being wound up under this Act, all books of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded. R. S., c. 129, s. 53. Books to be *prima facie* evidence of contents.

Compare Imperial Companies Act, 1862, s. 154.

The books are made *prima facie* evidence. Thus an entry in an allotment book (though there was no record of a meeting on the date of the entry) coupled with the admission of the contributory was *prima facie* evidence of allotment and threw on the contributory the burden of proving the allotment invalid: *In re Great Northern Salt, &c., Works, Ex p. Kennedy* (1890) 44 Ch. D. 472. The section does not, however, make the books *prima facie* evidence in favor of the liquidator against a contributory where the issue is substantially one between a creditor of the company and the person proceeded against as shareholder: *Re International Electric Co., Ltd., McMahan's Case* (1914) 31 O. L. R. 348; 20 D. L. R. 451. The entries in the books being *prima facie* evidence only the facts therein stated may be rebutted: *Page* v. *Austin* (1885) 10 S. C. R. 132.

145. Every affidavit, affirmation or declaration required to be sworn or made under the provisions or for the purposes of this Act, or to be used in the court in any proceeding under this Act, may be sworn or made in Canada before a liquidator, judge, notary public, commissioner for taking affidavits or justice of the peace; and out of Canada, before any judge of a Affidavits, before whom sworn.

Sect. 145. court of record, any commissioner for taking affidavits to be used in any court in Canada, any notary public, the chief municipal officer of any town or city, any British consul or vice-consul, or any person authorized by or under any statute of Canada, or of any province, to take affidavits. R. S., c. 129, s. 88.

Judicial notice of seals, stamp or signature.

146. All courts, judges, justices, commissioners and persons acting judicially shall take judicial notice of the seal, or stamp or signature as the case may be of any such court, liquidator, judge, notary public, commissioner, justice, chief municipal officer, consul, vice-consul, or other person, attached, appended or subscribed to any such affidavit, affirmation or declaration or to any other document to be used for the purposes of this Act. R. S., c. 129, s. 89.

Copy of order evidence of order.

147. When any order made by one court is required to be enforced by another court, the production of an office copy of the order so made certified by the clerk or other proper officer of the court which made the same, under the seal of such court, shall be sufficient evidence of such order having been made. R. S., c. 129, s. 85.

See the notes to ss. 126 and 127.

In proceedings in a court of a province other than that where the winding-up order was made to set aside an attachment made after the winding-up order, an affidavit by one of the liquidators setting out the fact of the making of the order was held to be sufficient proof thereof: *Salter* v. *St. Lawrence* (1896) 28 N. S. R. 335.

Failure to produce pass-book, how proved.

148. The absence of mention in the minutes of any meeting of contributories, creditors, shareholders or members under this Act, of the production of the liquidator's bank pass-book, shall be *prima facie* evidence that such pass-book was not produced at such meeting. R. S., c. 129, s. 37.

PART II.

Banks.

Application of Part.

149. The provisions of this Part apply to banks only, not including savings banks. R. S., c. 129, s. 97.

Creditor for what amount to apply.

150. The application for a winding-up order shall be made by a creditor for a sum of not less than one thousand dollars. R. S., c. 129, s. 98.

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151. The court shall, before making the order, direct a meeting of the shareholders of the bank and a meeting of the creditors of the bank to be summoned, held, and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators. R. S., c. 129, s. 98.

Direction of court for meeting of shareholders and creditors.

152. The court may appoint a person to act as chairman of the meeting of shareholders, and in default of such appointment, the president of the bank, or other person who usually presides at a meeting of shareholders, shall be chairman. R. S., c. 129, s. 99.

Chairman at meetings of shareholders.

153. The court may also appoint a person to act as chairman of the meeting of creditors, and in default of such appointment, the creditors at the meeting shall appoint a chairman. R. S., c. 129, s. 99.

Chairman of meeting of creditors.

154. In taking a vote at the meeting of shareholders, regard shall be had to the number of votes conferred by law, or by the regulations of the bank, on each shareholder present or represented at such meeting. R. S., c. 129, s. 100.

Voting as at bank meeting.

155. In taking a vote at the meeting of creditors, regard shall be had to the amount of the debt due to each creditor. R. S., c. 129, s. 100.

Voting regulated by debt.

156. The chairman of each meeting shall report the proceedings of the meeting to the court, and, if a winding-up order is made, the court shall appoint one or more liquidators not exceeding three to be selected, in its discretion, after such hearing of the parties as it deems expedient, from among the persons nominated by the majorities and minorities of the shareholders and creditors at such meetings respectively. R. S., c. 129, s. 101; 52 V., c. 32, s. 17.

Report to Court

Appointment of liquidators.

157. If no one has been so nominated, the liquidator or liquidators shall be chosen by the court. 52 V., c. 32, s. 18.

Court appoints.

In general it may be stated that the Court will appoint the nominee of that class which is most interested in the liquidation.

And when the double liability of the shareholders of a bank was likely to be called up, the nominee of the creditors was preferred to that of the shareholders: *Re Central Bank* (1887) 15 O. R. 309; *Re Bank of Liverpool* (1889) 22 N. S. 97; (1891) 18 S. C. R. 707.

There is nothing in the provisions of the Winding-up Act which requires that both creditors and shareholders should be represented on the board of liquida-

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tors: *Forsyth* v. *Bank of Nova Scotia* (1890) 18 S. C. R. 707.

When a company was being wound up by the sheriff under the Ontario Voluntary Winding-up Act, and the assets and books of the company were in the county, he was appointed liquidator by the Court in preference to a nominee residing out of the county of the petitioning creditor: *Re Alpha Oil Co.* (1887) 12 P. R. 298.

In *Re Commercial Bank of Manitoba* (1893) 9 Man. 342, it was said that the Court is confined to a selection between the persons nominated at the meetings provided for in these sections but may exercise its discretion, and it is not bound to accept the choice of the majority. Where the company is solvent the nominees of the shareholders will be preferred, but if it be insolvent or its solvency questionable the wishes of the creditors should be preferred. It was further considered undesirable to appoint a debtor of a company, even if the company held securities, if the security was at all doubtful.

Reservation of dividends for outstanding notes.

158. The liquidators shall ascertain as nearly as possible the amount of notes of the bank intended for circulation and actually outstanding, and shall reserve dividends on any part of the said amount in respect of which claims are not filed, until the expiration of at least two years after the date of the winding-up order, or until the last dividend, if such last dividend is not made until after the expiration of the said time.

Applied to subsequently filed claims.

2. If claims are not filed and dividends applied for in respect of any part of the said amount before the period by this section limited, the dividends so reserved shall form the last or part of the last dividend. R. S., c. 129, s. 103.

Publication of notices.

159. Publication in the *Canada Gazette* and in the official gazette of each province, and in two newspapers issued at or nearest to the place where the head office of a bank is situate, of notice of any proceeding of which, under this Act creditors should be notified, shall be sufficient notice to holders of bank notes in circulation.

In Quebec, publication in English and French.

2. If the head office is situated in the province of Quebec, one of the newspapers in which publication is to be made shall be a newspaper published in English and the other a newspaper published in French. R. S., c. 129, s. 104.

PART III. Sect. 160.

Life Insurance Companies.

Application of Part.

160. The provisions of this Part apply only to life insurance companies, and to insurance companies doing life and other insurance, in so far as relates to the life insurance business of such companies. R. S., c. 129, s. 105.

NOTE ON INSURANCE SECTIONS.

By section 162, the assets are to be applied *pro rata* towards the discharge of all claims of policy holders in Canada. There is no definition in the Winding-up Act of the term 'policy holders in Canada,' but there is a definition in the Insurance Act, 1917, c. 29, s. 2 (s). A question arose in Ontario in the winding up of the Massachusetts Benefit Association as to the meaning of the expression. The Master referred to this definition, and in a measure adopted it, but, having adopted it, found that it still required interpretation. The circumstances were that a policy had been issued on the life of a person resident in Canada, but it had been made payable to a person resident in the United States, and the question was " in whose favor," in the words of the corresponding s-s. H of the former Act, the policy was issued. The claim was made by the United States citizen and the Master held that the person on whose life the policy was issued was the person in whose favor it was issued, no matter to whom it was payable. The case does not appear to be reported.

Under section 111 (section 170 of this Act) in the same winding-up, several claims accrued after the date of the winding-up order, before the expiration of the thirty days mentioned. On many of the policies under which these claims arose there accrued, according to the terms of the policy, premiums after the date of the winding-up, and before the policy became a claim, the death of the policy holder having happened some months after the winding-up order, and the premium day having passed in the meantime. The premiums naturally were not paid because the company had gone out of existence as a

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living company, and there was really no one to whom to pay the premiums, the liquidator not representing the company as a going concern. These cases were treated as if no default existed on the part of the policy holder by reason of this non-payment, but as a condition of the allowance of his claim, the beneficiary was required to pay to the liquidator the amount which had thus accrued due in full, and then he was collocated on the list of allowed claims for the amount of his policy.

These decisions were followed in the winding up of the Covenant Mutual Benefit Company. It has also been held in valuing policies under s. 108 (ss. 165 & 166 of this Act) that beneficiary certificates of mutual insurance companies had no value beyond the amount of that portion of the current instalment of premium which had been paid and remained partially unearned at the date of the winding-up order.

The case of *Re Merchants' Life* [1901] 1 O. L. R. 256, is not in conflict with this view as it was determined on the particular wording of the Ontario Insurance Act.

Company without license liable as for insolvency.

161. Whenever a license of a company has expired or been withdrawn under the Insurance Act, and has not been renewed within thirty days after such expiry or withdrawal, the company shall be subject to the provisions of this Act applicable to the case of insolvency of such a company, except in case of,—

Exceptions.

(*a*) a company which previously to the twenty-eighth day of April, one thousand eight hundred and seventy-seven, was licensed to transact the business of life insurance in Canada and ceased to transact such business before the twenty-first day of March, one thousand eight hundred and seventy-eight, having before that date given written notice to that effect to the Minister; or,

(*b*) a company licensed under the Insurance Act to transact the business of life insurance in Canada which has, in manner provided by the said Act, procured the transfer of its outstanding policies in Canada to some company or companies licensed under the said Act, or obtained the surrender of its policies as far as practicable. R. S., c. 129, s. 106.

Application of deposits and assets.

162. In case of the insolvency of any company, the deposits of such company held by the Minister, and the assets held by the trustees under the Insurance Act, shall be applied *pro rata* towards the discharge of all claims of policy-holders in

Canada duly authenticated against such company. R. S., c. 129, s. 107. Sect. 162.

Claims of policy-holders in Canada.

163. Upon the insolvency of any company and the making of a winding-up order under this Act, the policy-holders in Canada shall be entitled to claim for the full net values, including bonus additions and profits accrued, of their several policies at the time of the winding-up order, less any amount previously advanced by the company on the security of the policies.

Rank with judgments.

2. Such claims shall rank with judgments obtained and claims matured on Canadian policies, in the distribution of the assets. R. S., c. 129, s. 108.

Valuation of policies.

164. The liquidator may require the Superintendent of Insurance to value, or procure to be valued under his supervision, the policies of the policy-holders in Canada, on the basis prescribed in the Insurance Act.

Expenses.

2. The expenses of such valuation, at a rate of three cents for each policy or bonus addition so valued, shall be retained by the Minister from the securities held by him. 62-63 V., c. 43, s. 6.

Sale of securities and assets by order of the court.

165. Upon the completion by the liquidator of the statement to be prepared by him of all judgments against the company upon policies in Canada, and of all claims upon policies matured or outstanding, the court shall cause the securities held by the Minister for such company, and the assets held by the trustees provided in the Insurance Act, or any part of them it deems fit, to be sold or realized in such manner and after such notice and formalities as the court appoints. R. S., c. 129, s. 108.

Distribution of proceeds.

166. The proceeds so realized, after paying expenses incurred, shall, except in so far as they have been applied under this Act to effect a re-insurance of policies, be distributed *pro rata* amongst the claimants according to such statement.

Recourse if proceeds do not cover claims.

2. If the proceeds are not sufficient to cover in full all claims recorded in the statement, such policy-holders shall not be barred from any recourse they have, either in law or equity, against the company issuing the policy against any shareholder or director thereof, other than for a share in the distribution of the proceeds aforesaid, or in respect to any distribution of the general property and assets of the company, other than the deposit and the assets vested in trustees. R. S., c. 129, s. 108.

Claim on cancellation of policy or contract.

167. Whenever the company or the liquidator, or the holder of the policy or contract of insurance exercises any right which it or he has to cancel any policy of contract, the holder shall be entitled to claim as a creditor for the sum which, under the terms of the policy or contract, is due to him upon such cancellation. R. S., c. 129, s. 109.

Sect. 168.

Statement of creditors to be prepared by the liquidator.

168. The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by any person, make a statement of all the persons appearing by the books and records of the officers of the company to be creditors or claimants on any matured, valued or cancelled policy or contract of insurance, and of the amount due to each such person in respect of such claims, and every such person shall be collocated and ranked as, and shall be entitled to the right of, a creditor or claimant for such amount, without filing any claim, notice or evidence, or taking any action: Provided that any such collocation may be contested by any person interested, and any such person who is not collocated, or who is dissatisfied with the amount for which he is collocated, may file his own claim. R. S., c. 129, s. 110.

Proviso for contestation.

Copy of statement to be filed.

169. A copy of such statement, certified by the liquidator, shall, forthwith after the making of such statement, be filed in the office of the Superintendent of Insurance at Ottawa.

Notice to be given by publication.

2. Notice of such filing shall forthwith be given by the liquidator by notice in the *Canada Gazette* and in the official gazette of each province, and in two newspapers issued at or nearest to the place where the head office in Canada of the company is situate.

Notice to be given by mail.

3. The liquidator shall also, forthwith, send by mail, prepaid, a notice of such filing to each creditor named in the statement, addressed to the addresses in Canada of such creditors, as far as the same are known, and, in the case of foreign creditors, addressed to the addresses of their representatives or agents in Canada, as far as the same are known. R. S., c. 129, s. 110.

Claims accruing after the winding-up order, but within 30 days thereof.

170. The holder of a policy or contract of life insurance, upon which a claim accrues after the date of the winding-up order and before the expiration of thirty days after the filing, in the office of the Superintendent of Insurance, of the statement referred to in the last preceding section, shall be entitled to claim as a creditor for the full net amount of such claim less any amount previously advanced by the company on the security of the policy or contract, and the said statement and the dividend sheet shall, if necessary, be amended accordingly: Provided that no claim which accrues after the expiration of the thirty days aforesaid shall rank upon the estate unless nor until there is sufficient to pay all creditors in full. R. S., c. 129, s. 111.

Claims accruing after 30 days.

Holder giving notice of willingness to reinsure.

171. If, before the expiration of the thirty days hereinbefore mentioned, the holder of a policy or contract of life insurance, on which a claim has not accrued, signifies in writing to the liquidator his willingness to accept an insurance in some other company for the amount which can be secured by the dividend on his claim to which such holder is or may become

entitled, the liquidator may, with the sanction of the court, effect for such holder an insurance to the amount aforesaid in another company or companies, approved of by the Superintendent of Insurance, and may apply to that purpose the dividend on his claim to which such holder is or may become entitled: Provided that such insurance shall be effected only as part of a general scheme for the assumption, by some other company or companies, of the whole or part of the outstanding risks and liabilities of the insolvent company. R. S., c. 129, s. 112.

Re-insurance must be part of general scheme.

The Insurance Act (7-8 Geo. V, 1917, c. 29, s. 42) now makes provision whereby the liquidator of an insolvent insurance company may, without the consent of the policy-holders, arrange for the re-insurance of the contracts of the policy-holders. And the liquidator may declare that any section of Parts III and IV of the Winding-up Act shall not apply. See also section 90 (2) of the Insurance Act as to proceedings instituted by the Attorney-General for the making of a winding-up order.

172. If the company is licensed under the Insurance Act, the liquidator shall report to the Superintendent of Insurance once in every six months, or oftener as the Superintendent requires, on the condition of the affairs of the company, with such particulars as the Superintendent requires. R. S., c. 129, s. 113.

Report to the superintendent of insurance.

173. Publication in the *Canada Gazette*, and in the official Gazette of each province, and in two newspapers published at or nearest to the place where the head office in Canada of an insurance company is situate, of notice of any proceeding of which, under this Act, creditors should be notified, shall be sufficient notice to holders of policies or contracts of insurance in respect of which no notice of claim has been received. R. S., c. 129, s. 114.

What is sufficient notice to holders of policies.

PART IV.

OTHER THAN LIFE INSURANCE COMPANIES.

174. The provisions of this Part apply only to insurance companies other than life insurance companies, and to insurance companies doing life and other insurance, in so far as relates to the insurance business of such companies which is not life insurance business. R. S., c. 129, s. 115

Application of Part.

Sect. 175.

When a company shall be deemed insolvent.

175. Any company shall be deemed insolvent upon its failure to pay any undisputed claim arising, or loss insured against in Canada, upon any policy held in Canada for the space of sixty days after becoming due, or, if disputed, after final judgment and tender of a legal valid discharge, and, in either case, after notice thereof to the Minister.

Time for notice to the Minister.

2. In any case when a claim for loss is, by the terms of the policy, payable on proof of such loss, without any stipulated delay, the notice to the Minister under this section shall not be given until after the lapse of sixty days from the time when the claim becomes due. R. S., c. 129, s. 116.

Application of deposit held by Minister

176. Any deposit held by the Minister for policy-holders, shall be applied *pro rata* towards the payment of all claims duly authenticated against such company, upon or in respect of policies issued to policy-holders in Canada. R. S., c. 129, s. 117.

Return premium.

177. Holders of policies or contracts of insurance on which no claim has accrued at the time the winding-up order is made, shall be entitled to claim as creditors, for such part of the premium paid, as is proportionate to the period of their policies or contracts respectively unexpired at the date of the winding-up order.

Ranks as judgment.

2. Such return or unearned premium shall rank with judgments obtained and claims accrued in the distribution of the assets. R. S., c. 129, s. 118.

Sale of securities.

178. Upon the completion of the statement to be prepared by the liquidator under this Act, the court shall cause the securities held by the Minister for the company, or any part of them it deems fit, to be sold in such manner and after such notice and formalities as the court appoints.

Application of proceeds.

2. The proceeds thereof, after paying expenses incurred, shall, except in so far as they have been applied under this Act to effect a re-insurance of the policies, be distributed *pro rata* among the claimants according to such statement.

Recourse in case of insufficiency of proceeds.

3. If the proceeds are not sufficient to cover in full all claims recorded in the statement, such policy-holders shall not be barred from any recourse they have, either at law or in equity, against the company issuing the policy, other than for a share in the distribution of the proceeds of the securities held for such company by the Minister. R. S., c. 129, s. 118.

Claim when policy cancelled.

179. Whenever the company or the liquidator, or the holder of the policy or contract of insurance, exercises any right which it or he has to cancel the policy or contract, the holder shall be entitled to claim as a creditor for the sum which, under the terms of the policy or contract, is due to him upon such cancellation. R. S., c. 129, s. 118.

Sect. 180.

Statement to be made by liquidators.

180. The liquidator shall, without the filing of any claim, notice or evidence, or the taking of any action by any person, make a statement of all the persons appearing, by the books and records of the officers of the company, to be creditors or claimants under the three last preceding sections, and of the amounts due to each such person thereunder. R. S., c. 129, s. 119.

Collocation and rank.

Contestation.

181. Every such person shall be collocated and ranked as, and shall be entitled to the rights of, a creditor or claimant for such amount, without filing any claim, notice or evidence, or taking any action: Provided that any such collocation may be contested by any person interested, and any person not collocated, or dissatisfied with the amount for which he is collocated, may file his own claim. R. S., c. 129, s. 119.

Copy to be filed.

Notice of publication.

182. A copy of such statement, certified by the liquidator, shall, forthwith after the making of such statement, be filed in the office of the Superintendent of Insurance, at Ottawa, and notice of such filing shall be forthwith given by the liquidator by notice in the *Canada Gazette*, and in the official gazette of each province, and in two newspapers published at or nearest to the place where the head office in Canada of the company is situate. R. S., c. 129, s. 119.

Notice by mail.

183. The liquidator shall also forthwith send by mail, prepaid, a notice of such filing to each creditor named in the statement, addressed to the addresses in Canada of such creditors, as far as the same are known, and, in the case of foreign creditors, addressed to the addresses of their representatives or agents in Canada, as far as the same are known. R. S., c. 129, s. 119.

If a claim accrues after a winding-up order but within 30 days of filing of statement.

Claims accruing after 30 days.

184. The holder of a policy or contract of insurance upon which a claim accrues, after the date of the winding-up order, and before the expiration of thirty days after the filing, in the office of the Superintendent of Insurance, of the statement aforesaid, shall be entitled to claim, as a creditor, for the full net amount of such claim; and the said statement and the dividend sheet shall, if necessary, be amended accordingly: Provided that no claim which accrues after the expiration of the thirty days hereinbefore mentioned, shall rank upon the estate, unless nor until there is sufficient to pay all creditors in full. R. S., c. 129, s. 120.

Re-insurance

185. Before the expiration of the thirty days aforesaid, the liquidator may, with the sanction of the court, arrange with any incorporated insurance company, approved of for such purpose by the Superintendent of Insurance, for the re-insurance by such company of the outstanding risks of the insolvent company, and for the assumption by such company of the whole

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or any part of the other liabilities of the insolvent company. R. S., c. 129, s. 121.

Payment of premium.

186. In case of such arrangement the liquidator may pay or transfer to such company, such of the assets of the insolvent company as may be agreed on as the consideration for such re-insurance or assumption, and in such case the arrangement for re-insurance shall be in lieu of the claim for unearned premium.

Application of surplus.

2. And remaining assets of the insolvent company shall be retained by the liquidator as a security to the creditors for the payment of their claims, and shall, if necessary, be so applied, and shall not be returned to the company, except on the order of the court after the satisfaction of such claims. R. S., c. 129, s. 121.

Report to Superintendent of Insurance.

187. If the company is licensed under the Insurance Act, the liquidator shall report to the Superintendent of Insurance once in every six months, or oftener, as the Superintendent requires, on the condition of the affairs of the company, with such particulars as the Superintendent requires. R. S., c. 129, s. 122.

What publication of notice sufficient.

188. Publication in the *Canada Gazette,* and in the official gazette of each province, and in two newspapers published at or nearest to the place where the head office of an insurance company is situate, of notice of any proceeding of which, under this Act, creditors are to be notified, shall be sufficient notice to holders of policies or contracts of insurance, in respect of which no notice of claim has been received. R. S., c. 129, s. 123.

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